PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 24 | Issue 4 Article 5

5-15-1997

A Time to Die?: Deciding the Legality of Physician-Assisted Suicide

Jennifer Cole Popick

A Time to Die?: Deciding the Legality of Physician-Assisted Suicide

I. INTRODUCTION

The practice of euthanasia—a deliberate, life-terminating act administered upon a mentally competent, terminally ill patient, at the patient's request, designed to peacefully end insufferable pain—dates back to ancient times when physicians' ethics obligated them to aid in ending their patients' interminable suffering.[1] In America, the New Jersey Supreme Court made the first legal acknowledgment of the right to elect euthanasia as a medical treatment in 1976 when it held that the right to privacy encompassed Karen Quinlan's right to refuse life-sustaining medical treatment.[2] Fourteen years later, the United States Supreme Court recognized the right to refuse unwanted medical treatment in *Cruzan v. Director, Missouri Department of Health*.[3]

The swelling numbers of terminally ill Americans, the technological advances that enable them to live longer, and the legal barriers to the ability of a terminally ill patient to seek professional aid in ending the suffering and anguish accompanying terminal illness have recently come to a head.[4] Increased media coverage of the suicide assistance provided by Dr. Jack Kevorkian and others has thrust physician-assisted suicide into the foreground of public scrutiny, demanding legal attention to the issue.[5]

The debate over physician-assisted suicide pits religion against science, and privacy against government intervention in the most emotion-

---

1. Cara Elkin, Note, *Renewed Compassion for the Dying in* Compassion in Dying v. State of Washington, 26 GOLDEN GATE U. L. REV. 1, 8 (1996). *See* Tom L. Beauchamp, *The Justification of Physician-Assisted Deaths*, 29 IND. L. REV. 1173, 1175 (1996). This type of euthanasia is modernly termed "active euthanasia" and is contrasted with "passive euthanasia"—the intentional forbearance of lifesaving procedures on terminally ill individuals. *Id.*

2. *See In re* Quinlan, 355 A.2d 647, 663-64 (N.J. 1976).

3. 497 U.S. 261, 278 (1990).

4. Christopher N. Manning, *Live and Let Die?: Physician-Assisted Suicide and the Right to Die*, 8 HARV. J.L. & TECH. 513, 513 (1996).

5. *Id.*

ally charged, controversial issue of life and death since *Roe v. Wade*.[6] The practice squarely conflicts with the Christian belief that only God may choose the time and manner of one's death.[7] The American Medical Association opposes the practice as violative of the Hippocratic Oath.[8] Yet, last year, twenty-six percent of physicians received requests for suicide assistance.[9]

The first victory for proponents of physician-assisted suicide came in the Ninth Circuit case *Compassion in Dying v. Washington*.[10] Meticulously crafted by Judge Stephen Reinhardt, who is often deemed the most liberal judge in the federal judiciary,[11] the opinion recognized a protected Fourteenth Amendment liberty interest in the ability to control the time and manner of one's death.[12] Four weeks after the Ninth Circuit handed down the *Compassion* opinion, the Second Circuit followed suit by striking down a similar New York statute as violative of the Equal Protection Clause in *Quill v. Vacco*.[13] Though the parties fought their battles on different coasts and won with different weapons, the message is clear: Americans increasingly demand the right to die with dignity.[14]

Although the *Cruzan* court specifically declined to decide whether the right to privacy, which protects the right of a competent person to refuse life-saving treatment, permits a physician to administer life-ending treatment upon the request of a similarly competent patient, the Court can no longer remain silent on the issue.[15] Currently, forty states have laws prohibiting the practice.[16] A bi-circuit split on the issue, an

---

6. 410 U.S. 113 (1973); *see* Joan Beck, *Assisted Suicide Is a Difficult Issue into Which Courts Must Delve; Individuals and Physicians Must Also Be Heard*, GREENSBORO NEWS & REC., Oct. 21, 1996, at A7.

7. Elkin, *supra* note 1, at 9; *see also* Matthew P. Previn, Note, *Assisted Suicide and Religion: Conflicting Conceptions of the Sanctity of Human Life*, 84 GEO. L.J. 589, 591 (1996) (postulating that anti-physician-assisted suicide laws violate the Establishment Clause "by endorsing a particular religious conception of the sanctity of life").

8. Beck, *supra* note 6, at A7.

9. *Id.*

10. 79 F.3d 790 (9th Cir.), *cert. granted sub nom.*, Washington v. Glucksberg, 117 S. Ct. 37 (1996).

11. Tom Bates, *Ninth Offers Unique Order in Court of Last Resort*, PORTLAND OREGONIAN, Sept. 22, 1996, at A1; William Carlsen, *Frontier Justice*, S.F. CHRON., Oct. 6, 1996, at 1Z7.

12. *Compassion*, 79 F.3d at 838.

13. 80 F.3d 716 (2d Cir.), *cert. granted*, 117 S. Ct. 36 (1996).

14. *See* Barbara Dority, *"In the Hands of the People:" Recent Victories of the Death-with-Dignity Movement*, THE HUMANIST, July 17, 1996, at 6 (reporting a recent survey finding that 73% of all Americans approve of physician-assisted suicide for terminally ill, competent adults).

15. *See* Elkin, *supra* note 1, at 13.

16. *Several States Join in Supreme Court Brief Seeking to Uphold Assisted Sui-*

upsurge in state initiatives regarding the practice, and the seemingly daily increase in Kevorkian-assisted suicide incidents have dropped physician-assisted suicide into the lap of widespread public discussion and have made the issue "ripe for the Supreme Court to decide."[17] Apparently recognizing the timeliness of the issue, the Supreme Court granted certiorari on both *Quill* and *Compassion*,[18] and heard arguments on these companion cases in January 1997.[19]

This Comment analyzes the current state of the law on physician-assisted suicide with a focus on the Second and Ninth Circuits and their respective opinions on the right of mentally competent, terminally ill adults to seek physician assistance in ending their lives.[20] This Comment discusses the current grassroots campaigns in various states to pass initiatives supporting the practice,[21] and the counter-effort by other states to block such efforts.[22] Finally, this Comment concludes with an analysis of how the Supreme Court might decide the issue and the possible legal repercussions of the decision on the terminally ill and the evolution of individual rights.[23]

---

cide Ban, WEST'S LEGAL NEWS, Sept. 10, 1996, *available in* 1996 WL 508257 [hereinafter *Several States*].

17. Brian Harmon, *Suicide Issue Fodder for High Court*, DETROIT NEWS, Apr. 4, 1996, at D3; *see also Right to Die Advocates Gain 2nd Legal Victory*, PORTLAND OREGONIAN, Apr. 3, 1996, at A1.

18. *Compassion* was given the less compelling caption of *Washington v. Glucksberg* on appeal. *See* Washington v. Glucksberg, 117 S. Ct. 37 (1996).

19. Transcript of Oral Argument at *1, *Glucksberg* (No. 96-110), *available in* 1997 WL 13671.

20. *See infra* notes 24-97 and accompanying text.

21. *See* Edward Grant, *Legal/Legislative Issues in Euthanasia and Physician-Assisted Suicide*, 36 CATH. LAW. 357, 358-68 (1996) (discussing initiatives in California, Michigan, and Washington state); Kevin M. Stansbury, Note, *Physician Assisted Suicide—Due Process, The Right to Die, Equal Protection and Slippery Slopes.* Compassion in Dying v. Washington, 31 LAND & WATER L. REV. 623, 628-31 (1996) (examining state efforts to extend privacy rights to include right to physician-assisted suicide); *infra* notes 98-117 and accompanying text.

22. *See Several States*, *supra* note 16; *infra* notes 98-117 and accompanying text.

23. *See infra* notes 118-89 and accompanying text. Kathryn L. Sisk Tucker, the attorney for Compassion in Dying, predicted a six-to-three vote split, with conservative Justices Thomas, Scalia, and Chief Justice Rehnquist refusing to allow the practice. Andrew Blum, *Defender Proffers Fees: Susan Smith's Lawyer Gives $83,000 to Resource Center*, NAT'L L.J., Apr. 15, 1996, at A7. A look at the reversal rate of the circuits, however, reveals a less optimistic picture, because both the Second and Ninth Circuits have high reversal rates in the Supreme Court. Between 1989 and 1994, the high Court reversed the Second Circuit 67% of the time. Deborah Pines, *Reasons for Reversal Differ Among Judges*, N.Y.L.J., Aug. 1, 1994, at 6. During the

II. THE CASES

A. Compassion in Dying v. Washington: *A Fundamental Right to Die*

1. Background

The Washington physician-assisted suicide statute provides that "'[a] person is guilty of promoting a suicide attempt when he knowingly causes *or aids* another person to attempt suicide,'" a felony subject to imprisonment and fines of up to five years and $10,000 respectively.[24] Four physicians, three terminally ill patients seeking to hasten death with prescription drugs, and Compassion in Dying, a Washington-based organization providing assistance to this type of terminally ill patient, challenged the "or aids" provision of the statute in a federal district court.[25] They moved for summary judgment, arguing that the law was unconstitutional both on its face and as applied because it prevented terminally ill patients from exercising a liberty interest protected by the Due Process Clause of the Fourteenth Amendment,[26] and because it treated similarly situated individuals differently in violation of the Equal Protection Clause.[27] Although the district court denied summary judgment as to the claims raised by the physicians and Compassion in Dying, it granted summary judgment for the patients on both grounds but only to the extent that the statute restricted physician-assisted suicide.[28] The State of Washington appealed the grant of summary judgment to the Ninth Circuit where a three-judge panel reversed the dis-

---

1995-96 Term, the Supreme Court reversed 10 of the 12 Ninth Circuit cases and two of the four Second Circuit cases argued. Marcia Coyle, *Term Reveals Pragmatic Supreme Court*, NAT'L L.J., July 29, 1996, at C2; *see also* Stansbury, *supra* note 21, at 643 (suggesting that the Supreme Court may find a right to assisted suicide under a personal autonomy theory).

24. Compassion in Dying v. Washington, 79 F.3d 790, 794 (9th Cir.), *cert. granted sub nom.*, Washington v. Glucksberg, 117 S. Ct. 37 (1996) (quoting WASH. REV. CODE § 9A 36.060 (1988) (emphasis in original) and citing WASH. REV. CODE §§ 9A 36.060(2), 20.020 (1)(c)).

25. *Id.* at 794, 797-98.

26. The Due Process Clause states in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 2.

27. *Compassion*, 79 F.3d at 798. The Equal Protection Clause provides in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 2.

28. *Compassion*, 79 F.3d at 797; Elkin, *supra* note 1, at 5-6 (reviewing the bases of the district court's opinion).

trict court's ruling.[29] "Because of the extraordinary importance of this case, [the Ninth Circuit] decided to rehear it en banc."[30]

2. The Court Decides

Led by Judge Stephen Reinhardt, the limited en banc court found a constitutionally protected liberty interest in determining the time and manner of one's death, and held that the court must balance this interest against the State's interests in the preservation of life.[31] Judge Reinhardt's majority opinion, reminiscent of a law review article, embraced a comprehensive analysis of substantive due process interests versus fundamental due process rights and recognized the Supreme Court's reluctance to find new fundamental rights.[32] It employed an extensive review of historical and contemporary societal attitudes toward suicide, from Socrates to the present day.[33] The opinion concluded by holding that the "or aids" provision of the statute violated the Due Process Clause of the Fourteenth Amendment "as applied to terminally ill competent adults who wish to hasten their deaths with medication prescribed by their physicians."[34]

---

29. Compassion in Dying v. Washington, 49 F.3d 586 (9th Cir. 1995), *rev'd en banc*, *Compassion*, 79 F.3d at 798.

30. *Compassion*, 79 F.3d at 798.

31. *Id.* at 793. The Ninth Circuit is the only "appellate court in the federal system . . . which permits a case to be reheard by a limited en banc court." Compassion in Dying, 85 F.3d 1440, 1441 (9th Cir.) (O'Scannlain, J., dissenting), *cert. granted sub nom.*, Washington v. Glucksberg, 117 S. Ct. 37 (1996).

32. *See Compassion*, 79 F.3d at 803-06.

33. *See id.* at 806-14.

34. *Id.* at 837. The Ninth Circuit rooted this decision in the fundamental rights cases of *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990), and *Roe v. Wade*, 410 U.S. 113 (1973), which the court determined compelled the use of a balancing test. *Compassion*, 79 F.3d at 816. Thus, the en banc court weighed the State's interest in preserving life, preventing suicide, avoiding the involvement of third parties and precluding the rise of undue influence, protecting children and family members, protecting the integrity of the medical profession, and avoiding adverse results against the fundamental liberty interest in hastening one's death. *Id.* at 816-37. The court ultimately concluded that the State's interests paled in comparison to the "individual's interest in deciding whether to end his agony and suffering by hastening the time of his death with medication prescribed by his physician." *Id.* at 837. Recognizing the limited scope of the holding, Judge Reinhardt noted that this conclusion—that the statute is unconstitutional as applied to a group of persons—is "atypical but not uncommon." *Id.* at 798 n.9.

a. A liberty interest in choosing the time and manner of one's death

Before determining whether the Washington statute offended the Constitution, the court had to conclude that a constitutionally protected right existed. Judge Reinhardt began by regarding the teachings of two legendary dissenters—Justices Harlan and Brandeis—who cautioned that the courts should not arbitrarily nor purposelessly restrain liberty interests.[35] He emphasized the vision of the Framers in "'conferr[ing], as against the government, the right to be let alone—the most comprehensive of rights, and the right most valued by civilized men.'"[36] He then noted the "compelling similarities" between the right-to-die cases and the abortion cases,[37] and recognized the guidance the abortion cases could provide to the disposition of the right-to-die cases.[38] Judge Reinhardt then launched into an historical and legal analysis of the right to receive an abortion,[39] concluding that the similarity between the two issues compelled the court to "examine whether Washington's ban on assisted suicide unconstitutionally restricts the exercise of that liberty interest."[40]

As the first step in that examination, the court determined exactly how to characterize the liberty interest at issue.[41] Judge Reinhardt rejected the connotation of "a liberty interest in committing suicide," finding that title too restrictive and inaccurate.[42] Instead, he preferred more inclusive terms, such as "'the right to die,'" "'determining the time

35. *Compassion*, 79 F.3d at 800; *see* Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled by* Katz v. United States, 389 U.S. 347 (1967).

36. *Compassion*, 79 F.3d at 800 (quoting *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting)).

37. *Id.* In both cases, "the relative strength of the competing interests changes as physical, medical, or related circumstances vary," similar religious and moral concerns are aroused, and history reflects years of condemnation of the practice, forcing it dangerously into back alleys. *Id.* at 800-01. Moreover, the legal and constitutional principles involved in both types of cases are the same. *Id.* at 801.

38. *Id.* at 801.

39. *Id.* Judge Reinhardt reviewed the Supreme Court's decisions in *Roe* and *Casey*, distilling from them a two-step due process analysis: determining the existence of a right, then examining whether the law places an undue burden on the exercise of that liberty interest. *Compassion*, 79 F.3d at 801-02 (citing *Casey*, 505 U.S. at 833; *Roe*, 410 U.S. at 113).

40. *Id.* at 802.

41. *Id.*

42. *Id.*

and manner of one's death,'" and "'hastening one's death'"[43] with the prescriptive aid of a physician.[44]

The court then analyzed the scope of the Due Process Clause and its application to this asserted liberty interest.[45] Because there is no "litmus test" to use in determining whether a liberty interest is protected, the court reviewed the evolution of the various approaches to Fourteenth Amendment jurisprudence and rejected an historical evidence approach.[46] The court instead held that the contemporary compassion for the terminally ill and the Supreme Court's recognition in *Cruzan* that "there is a due process liberty interest in rejecting unwanted medical treatment, including the provision of food and water by artificial means," necessarily indicate that there is a liberty interest in controlling the time and manner of one's death—a right to die.[47]

b. The balancing act—the right to die with dignity outweighs any state interest

Legitimate liberty interest in tow, Judge Reinhardt turned to the State's interests in abrogating the right to die. He identified the following six state interests furthered by Washington's statutory ban on suicide assistance: (1) "preserving life," (2) "preventing suicide," (3) "avoiding the involvement of third parties and curtailing the use of undue influence," (4) "protecting dependents from the hastened death of a terminally ill provider," (5) "protecting the integrity of the medical pro-

---

43. *Id.* The judge further expressed his doubt that the court should term the conduct at issue "suicide." *Id.*

44. *Id.* As Judge Reinhardt clarified, the opinion only relates to "the prescribing of medication by a physician for the purpose of enabling a patient to end his life" because that was the only conduct the plaintiffs challenged under the statute. *Id.*

45. *Id.* at 802-06.

46. *Id.* The judge noted that, while the history of a claimed liberty interest "plays a useful role" in determining its existence, significant cases have rejected the notion that the historical perspective is talismanic. *Id.* at 805. For example, in *Casey*, the Supreme Court held that the historical antipathy for, and prohibition of, abortion was no barrier to recognizing a liberty interest in the practice. *Id.* at 805 (citing Planned Parenthood v. Casey, 505 U.S. 833, 852 (1992)). Similarly, had history guided the decision in *Loving v. Virginia*, the Court would not have displaced miscegenation laws as unconstitutionally violative of equal protection and substantive due process. *Id.* at 805-06 (citing *Loving*, 388 U.S. 1 (1967)). For further discussion see *infra* notes 119-78.

47. *Compassion*, 79 F.3d at 815-16 (citing Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 281 (1990)).

fession," and (6) keeping the lid on the Pandora's Box that could open if the court declared the statute unconstitutional.[48] None of these interests, however, were compelling enough to "outweigh the terminally ill individual's interest in deciding whether to end his agony and suffering by hastening the time of his death with medication prescribed by his physician."[49] The court concluded that although the state may regulate physician-assisted suicide,[50] any ban prohibiting doctors from prescriptively assisting the terminally ill to hasten death "unconstitutionally *burdens* the liberty interests of the terminally ill."[51] In light of the due process violation, the court declined to take up the equal protection issue.[52]

3. Intracircuit Conflict

On June 12, 1996, the court denied a request for the entire court to rehear the case en banc.[53] The request failed to receive a majority of the non-recused active judges' votes, and in response, Judge O'Scannlain, not a member of the en banc court, rendered a scathing dissent.[54] Judge O'Scannlain censured the court for "lay[ing] the foundation for the discovery of an endless parade of protected liberty interests,"[55] and denounced their *Compassion* decision as "a shockingly broad act of judicial legislation."[56]

---

48. *Id.* at 816-17. As Judge Reinhardt explained, "[n]o decision is more painful, delicate, personal, important, or final than the decision how and when one's life shall end." *Id.* at 837.

49. *Id.* at 837.

50. The court recommended careful regulation of the practice as a safeguard to ensure that the practice does not escape the boundaries contemplated by its circumscribed holding. *Id.* at 832-33.

51. *Id.* at 838. The court also addressed the opinion of the District Court of Oregon in *Lee v. Oregon*, which held that the Oregon Death With Dignity Act, a voter initiative effectively permitting the same practice deemed protected by the *Compassion* decision, was an unconstitutional violation of the Equal Protection Clause. *Id.* at 837 (citing *Lee*, 891 F. Supp. 1429, 1438 (D. Or. 1995), *vacated and remanded* No. 95-35804, 1997 WL 80783 (9th Cir. Feb. 27, 1997), *and amended by* No. 95-35804, 1997 WL 128500 (9th Cir. Feb. 27, 1997)). Judge Reinhardt essentially overruled the district court's decision, deeming its reasoning erroneous and in conflict with the reasoning and legal conclusions of *Compassion*. *Id.* at 837-38.

52. *Id.* at 838 ("One constitutional violation is enough to support the judgment that we reach here.").

53. Compassion in Dying v. Washington, 85 F.3d 1440, 1440 (9th Cir.), *cert. granted sub nom.*, Washington v. Glucksberg, 117 S. Ct. 37 (1996).

54. *Id.* (O'Scannlain, J., dissenting); *see supra* note 31 (discussing the Ninth Circuit's limited en banc procedure).

55. *Compassion*, 85 F.3d at 1444 (O'Scannlain, J., dissenting).

56. *Id.* at 1442 (O'Scannlain, J., dissenting).

Although her discussion began with disapproval of the Ninth Circuit practice of rehearing cases in a "limited en banc" setting when there is an opinion by a three-judge panel, Judge O'Scannlain promptly expressed that the issue decided in *Compassion* was best left "to the popularly elected representatives of Washington, who are more capable than [the court] of deciding whether to recognize the exception desired by" and conferred upon the *Compassion* plaintiffs.[57] She also expressed disagreement with the merits of the court's decision in *Compassion*, stating her belief that *Casey* recognized no fundamental right to an abortion, and thus rendered the *Compassion* court's legal foundation for its decision unsound.[58] This lack of legal foundation, Judge O'Scannlain propounded, marked the court's extrapolation of a fundamental right to physician-assisted suicide[59] "one of the most egregious judicial leaps."[60] Judge O'Scannlain concluded her discourse by warning that "this case is *not* about aggressive pain management," because the state has never jailed a physician for over-medicating a terminally ill patient, provided the underlying intent is to lessen pain.[61]

B. Quill v. Vacco*: Equal Protection*

1. Background

Quill v. Vacco[62] originated from two New York statutes which prohibited the assistance of suicide.[63] Three physicians and three terminally ill patients seeking to end their lives with the aid of prescribed drugs filed suit to have the statutes declared unconstitutional as applied to physicians who seek to assist terminally ill, mentally competent adults wishing to hasten their deaths.[64] They also sought to enjoin future enforcement of the laws.[65] Just as in *Compassion*, the plaintiffs grounded their claim in the Fourteenth Amendment's Due Process and Equal Protection Clauses.[66]

---

57. *Id.* at 1443 (O'Scannlain, J., dissenting).
58. *Id.* at 1443-44 (O'Scannlain, J., dissenting).
59. *See supra* notes 45-47 and accompanying text (analyzing the en banc court's historically based determination of the right to physican-assisted suicide).
60. *Compassion*, 85 F.3d at 1444 (O'Scannlain, J., dissenting).
61. *Id.* at 1446 (O'Scannlain, J., dissenting).
62. 80 F.3d 716 (2d Cir.), *cert. granted*, 117 S. Ct. 36 (1996).
63. *See* N.Y. PENAL LAW §§ 120.30, 125.15(3) (McKinney 1987).
64. *Quill*, 80 F.3d at 719.
65. *Id.*
66. *Id.*; *see supra* notes 26 and 27 for text of clauses.

The district court denied the plaintiffs' motion for a preliminary injunction but found a justiciable issue and decided the case on its merits.[67] The court refused to find a protected fundamental liberty interest in physician-assisted suicide, however, and further held that the plaintiffs showed no equal protection violation.[68] The plaintiffs then appealed to the Second Circuit.[69]

2. Second Circuit Analysis: Rejection of a Due Process Right—Acknowledgment of an Equal Protection Violation

a. No due process right to die

Based on the Supreme Court's reluctance in *Bowers v. Hardwick*[70] to find new fundamental rights which lack "ancient roots" in societal history, the court could find no such foundation for the right to assisted suicide and thus declined invitation to expand substantive due process to encompass the right.[71] The court explained that there was "no cognizable basis in the Constitution's language or design" for recognizing a due process right to die with dignity.[72]

b. Equal protection violation

The Second Circuit court was far more receptive to the plaintiffs' claim that, because a competent person may order the removal of life support systems to voluntarily end his or her life,[73] the prohibition of physician-assisted, voluntary life cessation by one who is not on life support violates the Equal Protection Clause.[74] As the court explained, a state statute governing social welfare receives rational basis scruti-

67. Quill v. Koppell, 870 F. Supp. 78, 79 (S.D.N.Y. 1994), *rev'd sub nom.* Quill v. Vacco, 80 F.3d 716 (2d Cir.), *and cert. granted*, 117 S. Ct. 36 (1996).

68. *Id.* at 84-85.

69. *Quill*, 80 F.3d at 717.

70. 478 U.S. 186 (1986) (finding no fundamental liberty interest in homosexual sodomy).

71. *Quill*, 80 F.3d at 724 (quoting *Bowers*, 478 U.S. at 192).

72. *Id.* at 724-25.

73. The Supreme Court conferred this right in *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990).

74. *Quill*, 80 F.3d at 727-28.

ny,[75] and the courts will presume the statute valid if the law bears a rational relationship to a legitimate state interest.[76]

The court noted that New York has sustained a long-standing recognition of a competent adult's right to refuse medical treatment and force the removal of life support systems,[77] while simultaneously refusing to permit a similarly competent, terminally ill person not dependent upon life support to hasten death with the aid of a physician's prescription.[78] The court considered, but rejected, the district court judge's justification for this disparate treatment—that there is "a difference between allowing nature to take its course . . . and intentionally using an artificial death-producing device."[79] This "action-inaction distinction,"[80] explained the court, is meritless, as death by either method is unnatural.[81] If anything, the court observed, death by self-administration of prescribed drugs involves less physician action than the removal of artificial support inducing starvation, dehydration, and asphyxiation.[82]

---

75. *Id.* at 725 (citing Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985)). The court reviewed the various standards of review for legislation, noting that "[w]hile rational basis scrutiny governs judicial review of the constitutionality of legislation in the areas of social welfare and economics, strict scrutiny is the standard of review where a classification 'impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.'" *Id.* at 726 (citations omitted) (quoting Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976)). Because the court concluded that this case involved neither a fundamental right nor a suspect class, rational basis scrutiny was the appropriate standard of review. *Id.*

76. *Id.* at 725 (citing *Cleburne*, 473 U.S. at 440).

77. *Id.* at 727. New York case law has consistently recognized this right since 1914, when Judge Cardozo stated that "'[e]very human being of adult years and sound mind has a right to determine what shall be done with his body.'" *Id.* (quoting Schloendorff v. Society of New York Hosp., 211 N.Y. 125, 129 (1914)). Similarly, New York legislation is replete with provisions such as "do not resuscitate orders" and health care proxies. *Id.* at 727-28.

78. *Id.* at 729.

79. *Id.* (quoting Quill v. Koppell, 870 F. Supp. 78, 84 (S.D.N.Y. 1994), *rev'd sub nom.* Quill v. Vacco, 80 F.3d 716 (2nd Cir.), *and cert. granted*, 117 S. Ct. 36 (1996)).

80. *Id.* (quoting Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 296-97 (1990) (Scalia, J., concurring)). In *Cruzan*, Justice Scalia rejected the same distinction and noted that "the cause of death in both cases is the suicide's conscious decision to 'pu[t] an end to his own existence.'" *Cruzan*, 497 U.S. at 296-97 (Scalia, J., concurring) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *189 (alteration in original)).

81. *Quill*, 80 F.3d at 729.

82. *Id.*

The determination that similarly-situated individuals receive divergent treatment, however, is not dispositive to the equal protection analysis. As long as the disparate treatment is rationally linked to a compelling state interest, the difference in treatment does not violate the Equal Protection Clause.[83] In making this inquiry, the court asked, "[W]hat business is it of the state to require the continuation of agony when the result is imminent and inevitable?"[84] The court also reviewed the state interests evaluated by the *Compassion* court, and held that, like the Washington law, the New York statutes served no legitimate state interest that would excuse the unequal treatment they sanctioned.[85] In the words of Judge Miner, "Physicians do not fulfill the role of 'killer' by prescribing drugs to hasten death any more than they do by disconnecting life support systems."[86] Accordingly, because the court found no legally significant difference between hastening one's death by removing a life-support system and administering a lethal dose of medication to achieve the same result, the Second Circuit concluded that the statutory ban on physician-assisted suicide violated the Equal Protection Clause.[87]

c. Judge Calabresi's concurrence

Judge Calabresi issued a lengthy concurrence in *Quill* to express his belief that the majority's opinion was overreaching and unnecessarily broad in scope.[88] After an historical review of *Cruzan*, *Casey*, and

---

83. *Id.* The burden is on the plaintiff to establish that the law bears no rational relationship to any legitimate state interest. *Id.*

84. *Id.* at 730.

85. *Id.*

86. *Id.*

87. *Id.* at 731. This holding is particularly exceptional in light of the usual toothless application of the rational basis test. *See, e.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955) (ushering in the modern era of judicial restraint and recognizing that "[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws . . . because they may be unwise, improvident, or out of harmony with a particular school of thought."). It appears that the court applied a more focused rational basis test similar to that applied in *Romer v. Evans*, 116 S. Ct. 1620 (1996), *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), and *Plyler v. Doe*, 457 U.S. 202 (1982), which focuses on the actual, as opposed to conceivable, purpose of the law, and whether the law directly advances that purpose. *See also* Maureen M. Devlin, *Nota Bene:* Quill v. Vacco, 12 ISSUES L. & MED. 65, 66 (1996) (discussing the court's finding of rational basis as the appropriate standard of review); Martin Flumenbaum & Brad S. Karp, *Second Circuit Review: The Right to Die*, N.Y.L.J., Apr. 24, 1996, at 3 (discussing the history of, and decision in, *Quill*).

88. *Quill*, 80 F.3d at 732 (Calabresi, J., concurring).

Compassion, he concluded that neither case law nor the Constitution invalidated the laws banning physician-assisted suicide.[89]

III. LEAVING IT UP TO THE STATES?: THE SCALIA APPROACH

Like many advocates of judicial restraint, Justice Scalia believes that the legality of physician-assisted suicide is best left to the legislature. He has professed, "I'm not a guru sitting on some windswept Tibetan mountain waiting for someone to ask a question like 'Is there a right to die?'"[90] According to Justice Scalia, the Supreme Court has no business acknowledging rights not specifically enumerated in the Constitution.[91] This opinion is consistent with Justice Scalia's position expressed in his *Cruzan* concurrence.[92] Although he agreed with the majority's ultimate conclusion that a state requirement allowing the withdrawal of life support only upon finding clear and convincing evidence that the artificial sustenance is against the wishes of the patient,[93] Justice Scalia stated, "I would have preferred that we announce, clearly and promptly, that the federal courts have no business in this field; that American law has always accorded the State the power to prevent, by force if neces-

89. *Id.* at 738 (Calabresi, J., concurring). Judge Calabresi was also concerned that the court had decided the merits of the case without first identifying the legitimate interests the state sought to promote through the anti-suicide assistance laws. *Id.* at 742 (Calabresi, J., concurring). In light of New York's liberal abortion laws, death penalty position, and acknowledgment of a patient's right to order removal of life-sustaining mechanisms, Judge Calabresi could not accept that the state's interests were in life preservation. *Id.* at 740-41 (Calabresi, J., concurring); *see also* Devlin, *supra* note 87, at 67 (discussing Judge Calabresi's concurrence).

90. Harmon, *supra* note 17, at D3.

91. David Reed, *Judges Make Poor Lawmakers, Scalia Says*, RICHMOND TIMES, Apr. 3, 1996, at B4. Judge O'Scannlain of the Ninth Circuit Court of Appeals shares this view. *See supra* notes 55-56 and accompanying text.

92. Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 292-93 (1990) (Scalia, J., concurring). Justice Scalia expressed this same sentiment during an address to the Pepperdine University School of Law. He suggested that the American system should follow the English model and let the legislature, not the Court, determine and legislate the evolving standards of decency. Justice Antonin Scalia, Address at Pepperdine University School of Law (Jan. 22, 1997).

93. *Cruzan*, 497 U.S. at 293 (Scalia, J., concurring).

sary, suicide . . . ."[94] The impropriety of the Court's occupation of this field, Justice Scalia declared, was due to the fact that

> the point at which life becomes "worthless," and the point at which the means necessary to preserve it become "extraordinary" or "inappropriate," are neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory.[95]

The strength of Justice Scalia's conviction to these principles of judicial restraint and enumerated rights casts serious doubt on the notion that he would find a protected liberty interest in a terminally ill individual's right to physician assistance in the termination of his or her life.[96] Justice Scalia's ideology will likely lead to judicial silence on the existence or scope of the right, a result that will leave the regulation of physician-assisted suicide up to the legislatures or citizenry of the fifty states.[97]

---

94. *Id.* (Scalia, J., concurring). *But see* Leonard John Deftos, *Is There a Constitutional Right to Die*, SAN DIEGO UNION-TRIB., Jan. 10, 1997, at B9 (arguing that "this is exactly the function of the federal judiciary, and it has been so at least since Article III was included in the Constitution in 1787, and certainly since Chief Justice John Marshall's 1803 decision in *Marbury vs. Madison*").

95. *Cruzan*, 497 U.S. at 293 (Scalia, J., concurring). Justice Scalia took a similar position with respect to the constitutional absence of an explicit statement concerning a woman's right to terminate her pregnancy. In his *Casey* concurrence and dissent, he concluded that abortion is not a liberty interest protected by the Constitution because "(1) the Constitution says absolutely nothing about it, and (2) the long standing traditions of American society have permitted it to be legally proscribed." Planned Parenthood v. Casey, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in judgment in part and dissenting in judgment in part). Justice Scalia further explained his position by stating his belief "that the text of the Constitution, and our traditions, say what they say and there is no fiddling with them." *Id.* at 998 (Scalia, J., concurring in judgment in part and dissenting in judgment in part). Moreover, in a recent speech, Justice Scalia stated that it is "'absolutely plain that there is no right to die,'" because there were anti-suicide laws on the books when the states adopted the Constitution. Mark O'Keefe & Tom Bates, *Supreme Court Takes up Assisted Suicide This Week, Justices Will Hear Arguments in Case with Potential to Change "Our Complete Culture,"* ST. LOUIS POST-DISPATCH, Jan. 5, 1997, at 4B (quoting Justice Scalia).

96. Justice Scalia's severe criticism of any decision by the Court that appears to charter new territory in the field of individual rights as lacking "reasoned judgment" further illustrates that he is unlikely to support anything other than state regulation of the right to die. *See Casey*, 505 U.S. at 983 (Scalia, J., concurring in judgment in part and dissenting in judgment in part) (noting the lack of reasoned judgment in the *Roe* abortion decision); *see also* Romer v. Evans, 116 S. Ct. 1620, 1637 (1996) (Scalia, J., dissenting) (denouncing the majority's holding unconstitutional a Colorado constitutional amendment forcing homosexuals to amend the constitution before they could receive preferential treatment as lacking any "foundation in American constitutional law"). For a discussion of unprincipled decisions, see generally MICHAEL J. GERHARDT & THOMAS D. ROWE, JR., CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES 17-37 (1993).

97. *See* Donald L. Beschle, *The Role of Courts in the Debate on Assisted Suicide:*

A. Death by Direct Democracy

The practice of physician-assisted suicide could become part of state law through direct democracy, namely, initiatives and referenda. The voter initiative power enables the citizenry to precipitate change independent from the often unsympathetic agendas of politicians.[98] By referendum, the populace may curtail the application of unpopular laws enacted by the state legislature.[99] Although there currently exists no national initiative power, nearly half the states have given their electorate the ability to legislate directly.[100]

The citizens of Oregon attempted the initiative approach to physician-assisted suicide by enacting the "Death With Dignity Act" in 1994.[101] Unfortunately, in August 1995, a court enjoined the Act as unconstitutional.[102] The electorates of both California and Washington attempted similar provisions with even less success. In 1991, Washington assisted-suicide proponents succeeded in getting a measure on the ballot to authorize "aid-in-dying."[103] Washington's Initiative 119 fell short of passage by five percent of the vote after voters succumbed to the media offensive that hailed the measure as lacking adequate safeguards.[104]

In 1992, California's Proposition 161 met a similar fate when an effective media blitz turned voters against the ballot provision by exploiting fears of inadequate regulation.[105] Although the initiative offered defini-

---

A Communitarian Approach, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 367, 402 (1995) (explaining that states' approaches will vary).

98. For a discussion of the initiative and referendum powers, see generally Stephen H. Sutro, *Interpretation of Initiatives by Reference to Similar Statutes: Canons of Construction Do Not Adequately Measure Voter Intent*, 34 SANTA CLARA L. REV. 945, 946 (1994). K.K. DuVivier provides a thorough discussion of the history of the voter initiative in *By Going Wrong All Things Come Right: Using Alternate Initiatives to Improve Citizen Lawmaking*, 63 U. CIN. L. REV. 1185 (1995).

99. ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW 719-20 (2d ed. 1993). For a comparison of the initiative and referendum powers, see David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13 (1995).

100. Magleby, *supra* note 99, at 14-15, 42.

101. Stephanie Hinz, *U.S. Supreme Court to Decide Whether Terminally Ill Have Right to Commit Physician-Assisted Suicide*, WEST'S LEGAL NEWS, Oct. 3, 1996, *available in* 1996 WL 559225, at *2.

102. *Id.*

103. Grant, *supra* note 21, at 361.

104. *Id.* at 361-62 & n.29.

105. *Id.* at 363.

tions for terms such as "terminal condition,"[106] it failed to contain a provision for informed consent or a definition for its requirement that the patient's death plea be an "enduring request."[107]

Although previous attempts at direct legislation of the right to die failed, the support that has rallied around the cause in the five years since California's Proposition 116 makes it unlikely that this dismal a showing will repeat itself.[108] Just as public acceptance of a woman's right to an abortion did not build overnight, so too has support for the right for a terminally ill patient to end his or her interminable suffering been slow-coming.[109] As Oregon's Death with Dignity Act illustrates, however, sufficient public support for physician-assisted suicide now exists, making direct legislation of the right possible and desirable.[110] On the eve of the Supreme Court's hearing oral argument on physican-assisted suicide, polls showed that nearly sixty percent of Americans supported legalizing the practice.[111] If those polled vote their minds, the terminally ill may find some relief from ballot-casters, even if the Scalia camp prevails.

B. Death by Representation

State legislatures could also recognize the right to die by permitting the practice only in certain situations, thus drawing arbitrary lines of demarcation.[112] Absent a decision like *Roe*, specifically defining the scope of the right and the permissible governmental interference with that right,[113] uniformity among the states is unlikely.

Notwithstanding the lack of consistency, however, state legislation of the right is not without benefits. Even if the Supreme Court finds no protection under either the Due Process or Equal Protection Clauses for physician-assisted suicide, the states may still support and protect the practice by finding a greater level of protection under their own state constitutions which afford "a font of individual liberties."[114]

---

106. *Id.*

107. *Id.* at 366-67.

108. *See* Dority, *supra* note 14, at 6 (discussing the recent upsurge in American support for physician-assisted suicide).

109. *See* Compassion in Dying v. Washington, 79 F.3d 790, 800-01, *cert. granted sub nom.*, Washington v. Gluckburg, 117 S. Ct. 37 (1996).

110. *See supra* notes 101-02 and accompanying text.

111. Cathy Young, *Have the Courts Undermined Culture?*, DETROIT NEWS, Jan. 14, 1997, at A9.

112. Champions of the assisted suicide cause have already begun to propose legislation to tackle the issue. *Id.*

113. *See* Roe v. Wade, 410 U.S. 113, 163 (1973) (thoroughly summarizing and repeating the essential holdings of the Court).

114. William J. Brennan, Jr., *State Constitutions and the Protection of Individual*

Despite public support for the right to die, the issue has not found resounding support in the state legislatures. Between 1995 and 1996, sixteen states proposed legalization legislation, but the bills did not receive the votes needed to become law.[115] Perhaps a decision leaving the issue up to the states will launch a grassroots campaign to rally the state legislatures to resolve the issue in a manner consistent with the contemporary public position.

Should Justice Scalia obtain the support of four other justices, the future of the right to die with dignity remains uncertain.[116] Regardless of whether the right is restricted or conferred by the legislatures or the balloters, arbitrary or vague regulations will force the issue back into the courtroom.[117] The states could avoid much of that litigation, however, if the Court finds that the right to die exists and provides a clear definition of its scope.

IV. CONSTITUTIONAL SUPPORT FOR THE RIGHT TO DIE

Although the Scalia approach may find support in doctrines of judicial restraint and enumerated rights, a refusal by the Court to legalize the practice of physician-assisted suicide will not sit well with contemporary

---

Rights, 90 HARV. L. REV. 489, 490-91 (1977), *reprinted in* WILLIAMS, *supra* note 99, at 161-63. Because the Federal Constitution provides only the minimum standard of rights protection, states can, and often do, provide a greater level of protection of individual rights. *See* WILLIAMS, *supra* note 99, at 194-95 (providing a comprehensive discussion of a greater degree of rights protection by the states after the Supreme Court has refused to extend federal constitutional protection).

115. Frank J. Murray, *Assisted Suicide Goes to Top Court: Appellate Judges Toppled State Bans*, WASH. TIMES, Jan. 6, 1997, at A1.

116. Considering the support Justice Scalia received from Justice Thomas and Chief Justice Rehnquist in his *Romer* dissent and his concurrence and dissent in *Casey*, it is likely that this conservative triumvirate will maintain their status as bedfellows through this controversy. *See* Romer v. Evans, 116 S. Ct. 1620, 1629 (Scalia, J., dissenting); Planned Parenthood v. Casey, 505 U.S. 833, 979 (Scalia, J., concurring in judgment in part and dissenting in judgment in part). Court watchers predict, based on recent decisions in abortion cases, that Justices O'Connor, Kennedy, and Souter will be the swing voters on whom the outcome hinges. Tom Brazaitis, *Court Weighs Life and Death Issue: Arguments on 2 Cases of Physician-Assisted Suicide to Be Heard*, PLAIN DEALER (Clev.), Jan 8, 1997, at 1A.

117. Murray, *supra* note 115, at A1. Some political pundits insist that "'[t]he more direct legislation you have . . . the greater the body of our judge-made law.'" WILLIAMS, *supra* note 99, at 720 (quoting George Lefcoe & Barney Allison, *The Legal Aspects of Proposition 13: The Amador Valley Case*, 53 S. CAL. L. REV. 173, 173 (1979)).

constitutional jurisprudence—particularly the decisions in *Roe*, *Casey*, *Cruzan*, and *Romer*. In these cases, the Court was willing to forge ahead to create a just outcome without regard to the usual decisional restraints.[118]

A. Personal Autonomy

If the Court refuses to recognize the fundamental right to die with dignity, the Justices will have to overcome the difficult obstacle of their strong recognition of personal autonomy in *Roe* and again in *Casey*.[119] The parallels between the abortion cases and the right to die are unmistakable. In his introduction to the majority opinion in *Roe*, Justice Blackmun acknowledged

> the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.[120]

The current Court could use this same language as a template to introduce the opinion in this case. Proponents of the right to die root their argument in history, precedent, and a contemporary understanding of the need for legalization of the practice.[121] Opponents pull their arguments from religion,[122] concerns that legalization will undermine the reputation of the medical community by transforming healers into killers,[123] and the fear of opening the floodgates which would lead America down the slippery slope to genocide.[124] Although these conflicting concerns

---

118. The usual, neutral restraints on judicial decision making include principles of stare decisis and proper application of standards of review. *See* GERHARDT & ROWE, *supra* note 96, at 17-37.

119. *See* Stansbury, *supra* note 21, at 640 (predicting that the Supreme Court will ground its recognition of the right to die in the doctrine of personal autonomy).

120. Roe v. Wade, 410 U.S. 113, 116 (1973).

121. *See* Compassion in Dying v. Washington, 79 F.3d 790 (9th Cir.), *cert. granted sub nom.*, Washington v. Glucksberg, 117 S. Ct. 37 (1996).

122. *See, e.g.*, Grant, *supra* note 21, at 368 (urging opposition to the right to die movement based on religious beliefs). *See generally* Previn, *supra* note 7 (thoroughly discussing the religious tenets opposing physician-assisted suicide).

123. The American Medical Association (AMA) takes the position that suicide assistance "is fundamentally incompatible with the physician's role as healer." Laurie Winslow & Dana Sterling, *Right-to-Die Argument Intensifies—Tulsa Experts Join National Debate*, TULSA TRIB. & TULSA WORLD, Jan. 9, 1997, at A1. Instead, the AMA advocates pain control through medication. *Id.*

124. *See* Robert L. Kline, *The Right to Assisted Suicide in Washington and Oregon: The Courts Won't Allow a Northwest Passage*, 5 B.U. PUB. INT. L.J. 213, 233 (1996).

make for an emotionally charged debate over the issue, it is important for the Court to recognize, as Justice Blackmun did in *Roe*, that the judiciary's role "is to resolve the issue by constitutional measurement, free of emotion and of predilection."[125] The Court must remember Justice Holmes's warning in his *Lochner v. New York*[126] dissent that the Framers wrote the Constitution for a diverse group of Americans with conflicting viewpoints, and the Court's opinion of any perspective as "shocking" should not be dispositive of the issue.[127]

Another parallel between the right to die and the abortion issues is the existence of the practice despite legal proscriptions. Before the Court decided *Roe*, women sought and obtained abortions under less than desirable conditions, creating a serious health risk.[128] Thus, the legalization and regulation of abortion procedures advanced the compelling state interest of patient safety.[129]

It is no secret that the terminally ill currently end their lives and suffering through suicide. Some beg family members and loved ones to administer the final blow.[130] Others find sympathetic physicians who secretly help patients with morphine injections and withdrawal of life support.[131] Still others make their final exit with a stranger who discretely dispenses a welcome death in the back of his van.[132] None of these methods, are regulated to ensure the utmost safety to the patient.

Opponents of the right to abortion made a similar argument in insisting that the legalization of the practice would lead to infanticide. Cheryl K. Smith, *What About Legalized Assisted Suicide?*, 8 ISSUES L. & MED. 503, 514-15 (1993). Regulations will do much to quell these fears of mass extermination. By drawing the line at viability, the *Roe* decision "created a handhold along the slippery slope." Carl E. Schneider, *Rights Discourse and Neonatal Euthanasia*, 76 CAL. L. REV. 151, 168 (1988).

125. *See Roe*, 410 U.S. at 116.

126. 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

127. *Id.* (Holmes, J., dissenting); *see also Roe*, 410 U.S. at 116-17.

128. *Roe*, 410 U.S. at 150.

129. *Id.*

130. *See, e.g.*, Brazaitis, *supra* note 116, at 1A (detailing the story of one mother who eventually overcame her own emotions to carry out her terminally ill daughter's request to end her suffering).

131. In his argument before the Court, Laurence Tribe noted this secret practice of physician-assisted death. Steve Lash, *Justices Wrestle with Whether Constitution Protects Doctor-Assisted Suicide*, WEST'S LEGAL NEWS, Jan. 9, 1997, *available in* 1997 WL 14249, at *10.

132. Dr. Jack Kevorkian used this method to help more than 40 people leave their terminally ill bodies. Mark O'Keefe & Tom Bates, *The Freedom to Die*, PORTLAND OREGONIAN, Jan. 5, 1997, at B1.

B. *State Regulation of a Protected Liberty Interest*

Although *Roe* recognized that the right to terminate a pregnancy is not an unqualified right,[133] *Casey* fully propounded the state's ability to regulate a liberty interest, provided that the regulation creates no undue burden.[134] Like *Roe*, *Casey* recognized the sensitive nature of privacy issues such as abortion and reaffirmed the continued vitality of the personal autonomy interest defended in *Roe*: "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."[135] The Court also emphasized the need for governmental non-interference with these liberty interests, because "[b]eliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State,"[136] and one's destiny "must be shaped to a large extent on [one's] own conception of her spiritual imperatives and her place in society."[137] Despite *Casey*'s reaffirmation of the strength of one's liberty interest in "defin[ing] one's own concept of existence,"[138] *Casey* also plowed new ground for state regulations of liberty interests, provided that the regulations are reasonably related to a legitimate state goal and do not erect "a substantial obstacle" to the free exercise of a constitutional right.[139] Accordingly, in *Casey* the Court concluded that Pennsylvania's imposition of a twenty-four hour waiting period and a parental consent provision for minors were constitutional.[140] A spousal consent requirement, however, was unduly burdensome because it effectively subordinated a woman's liberty interest to that of her husband.[141]

A similar approach led the Court to find a protected liberty interest in a competent person's refusal of unwanted medical treatment in *Cruzan*.[142] Again, the Court noted the gravity of the decision, characterizing "[t]he choice between life and death [as] a deeply personal decision of obvious and overwhelming finality."[143] Although the Court only assumed without deciding that an individual has "a right to die," the Court concluded that a state could regulate the right by requiring proof by clear and convincing evidence of an individual's preference for death

---

133. *Roe*, 410 U.S. at 154.
134. Planned Parenthood v. Casey, 505 U.S. 833, 876 (1992).
135. *Id.* at 851.
136. *Id.*
137. *Id.* at 852.
138. *Id.* at 851.
139. *Id.* at 877.
140. *Id.* at 887, 899. The twenty-four hour waiting period between counseling and the abortion procedure is intended to foster informed decision making. *Id.* at 885.
141. *Id.* at 898.
142. Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 279 (1990).
143. *Id.* at 281.

over artificial maintenance of life in a permanent vegetative state before the withdrawal of life support.[144] The Court rejected an approach permitting withdrawal of life support upon the "substituted judgment" of close family members, based on a concern that the substituted decision might not adequately reflect the concerns of the individual patient.[145]

Cruzan and *Casey* have paved the way for the Court to recognize the right to die, subject to certain state regulations. *Cruzan* illustrates that the Court is willing to recognize the extremely personal nature of the decision to terminate one's life and the Fourteenth Amendment's protection of the choice to refuse means of sustaining life.[146] By its affirmation of *Roe*, *Casey* emphasizes one of the fundamental underpinnings of Fourteenth Amendment jurisprudence—that the Court cannot define liberty interests solely based on moral attitudes.[147] A principled decision on the right to physician assistance cannot ignore the strong precedential value of *Roe*, *Cruzan* and *Casey*.[148] Thus, any decision that does not continue to recognize a liberty interest in rejecting governmental interference with personal autonomy will signify a judicial retreat from promotion of constitutional protection of liberty interests. As Laurence Tribe remarked, such a decision risks "cutting the roots out under the tree of liberty."[149]

C. The Unprincipled Decisions

Several recent decisions reflect the Court's willingness to be outcome oriented in deciding tough issues. *Roe*, *Cruzan*, and *Romer* illustrate that the Court can mold history and case law to fit a previously unrecognized right when policy dictates.[150] In each case, the majority made the "just"

144. *Id.* at 284.
145. *Id.* at 286.
146. *See id.* at 281.
147. Sylvia A. Law, *Physician-Assisted Death: An Essay on Constitutional Rights and Remedies*, 55 MD. L. REV. 292, 315 (1996).
148. *See supra* note 96 (explaining the principled, or reasoned, decision approach).
149. O'Keefe & Bates, *supra* note 95, at 4B.
150. The one exception to this line of cases is *Bowers v. Hardwick*, 478 U.S. 186 (1986). This author believes that *Bowers* was simply too great an affront to the moral majority for the Court to follow this policy-based approach. However, the recent decision in *Romer* indicates the Court's acknowledgement of increased public acceptance of the homosexual community. *See* Romer v. Evans, 116 S. Ct. 1620 (1996). Thus, any decision that does not produce a "just" result will be out of step with the Court's recent trend.

decision and then forced history and stare decisis to fit with that decision.[151]

The *Roe* decision is perhaps the most glaring example of the Court's willingness to stretch the Constitution in accordance with pressing social policy concerns.[152] *Roe* could not make the ethereal nature of the abortion right more apparent. The Court dug deep into personal privacy notions surrounding the Fourteenth Amendment to discover a woman's right to terminate her pregnancy.[153] The Court even suggested that the Ninth Amendment may reserve the right to the people.[154] Despite the apparent lack of legal support for the practice, the Court broadened its focus, addressing the less specific right to personal autonomy, a right which the Court found supported by ample precedent.[155] The opinion's conclusion, however, reflects the true motivation for the decision: "the demands of the profound problems of the present day."[156]

The *Cruzan* decision, to the extent that it recognizes a mentally competent person's liberty interest in choosing death, further illustrates the Court's propensity to arrive at the just conclusion when deeply personal interests are at stake. Writing for the majority, Chief Justice Rehnquist stated that the Court inferred the right to die from prior decisions recognizing the right to refuse unwanted medical treatment.[157] The opinion, however, lacks any case law or historical support for the recognition of a constitutional right to die.[158] Thus, it is more likely that the modern societal recognition that "[t]he choice between life and death is a deeply

---

151. *See, e.g., Romer*, 116 S. Ct. at 1620. Justice Scalia criticized these decisions as unreasoned or unprincipled. *See supra* notes 90-95 and accompanying text. Although Justice Scalia was not on the Court when it decided *Roe*, he used his concurrence and dissent in *Casey* to express that "*Roe* was plainly wrong," as it lacked "reasoned judgment." Planned Parenthood v. Casey, 505 U.S. 883, 983 (1992) (Scalia, J., concurring in judgment in part and dissenting in judgment in part). Justice Scalia's concurrence in *Cruzan* resounds disapproval of the Court's recognition of the right to die. *Cruzan*, 497 U.S. at 293 (Scalia, J., concurring). Similarly, Justice Scalia made no attempt to veil his discontent with the *Romer* decision. *See infra* notes 161-63 and accompanying text.

152. *See* GERHARDT & ROWE, *supra* note 96, at 8-9 ("For many, *Roe v. Wade* was the quintessential example of judges illegitimately writing their personal preferences into constitutional doctrine.").

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

154. *Id.* This notion has expanded into the conception that the Constitution is partially unwritten and grounded in natural law. GERHARDT & ROWE, *supra* note 96, at 9.

155. *Roe*, 410 U.S. at 152.

156. *Id.* at 165.

157. Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 278 (1990).

158. On the other hand, Justice Scalia's concurrence is replete with historical evidence against the constitutional recognition of the right to take one's life. *See id.* at 294 (Scalia, J., concurring).

personal decision of obvious and overwhelming finality" drove the opinion.[159]

The Court's decision in *Romer* may suggest that a majority of the current Court is willing to achieve the right or just outcome despite a lack of constitutional or historical support for that conclusion. In *Romer*, six members of the Court struck down Colorado's Constitutional Amendment 2, which prohibited the acknowledgment of "Homosexual[s], Lesbian[s], or Bisexual[s]" as a protected class without first amending the state constitution.[160] As Justice Scalia's dissent illuminates, the majority arrived at its decision without mention of *Bowers v. Hardwick*,[161] which, only a decade ago, declined to hold that homosexuals were a suspect class deserving of heightened protection.[162] The majority ignored all historical disfavor for laws protecting homosexuals and instead declared that "[i]t is not within our constitutional tradition to enact laws of this sort."[163]

The misfit of the *Romer* decision in constitutional jurisprudence is also illustrated by the majority's failure to adhere to the usual constitutional tests. The Court found that Colorado's law lacked even a rational relation to "any identifiable legitimate purpose or discrete objective."[164] Accordingly, the Court reserved further comment on the appropriate level of scrutiny courts should apply to the issue.[165]

As *Roe*, *Cruzan* and *Romer* illustrate, when public policy and sentiment dictate, just results follow. In light of these decisions, the Court's recognition of the right to die with physician assistance would be in good company.

---

159. *Id.* at 281.

160. Romer v. Evans, 116 S. Ct. 1620, 1623 (1996). Colorado adopted the law in a 1992 statewide referendum as a backlash against the enactment of numerous local ordinances which prohibited discrimination based on sexual orientation in housing, employment, education, public accommodations, and health and welfare services. *Id.* The State intended adoption of the Amendment merely as a repeal of those ordinances. *Id.* The Court, however, felt that it placed an extra and unconstitutional obstacle in the way of the political process for a group of individuals based solely on anti-homosexual animus. *Id.* at 1628.

161. 478 U.S. 186 (1986).

162. *Romer*, 116 S. Ct. at 1629 (Scalia, J., dissenting); *Bowers*, 498 U.S. at 190-91.

163. *Romer*, 116 S. Ct. at 1628.

164. *Id.* at 1629.

165. *Id.*

D. *The Scope of Review*

Another factor that may affect the Court's analysis and consequent decision is the scope of the right reviewed. The impact of this factor is best illustrated by the Court's 1989 decision in *Michael H. v. Gerald D.*[166] In *Michael H.*, a plurality of the Court upheld a California presumption of legitimacy for children born in wedlock, consequently denying an adulterous father's claim of paternity.[167] The Court reviewed a child's claim that the presumption infringed upon a natural father's right to obtain visiting rights with his child.[168] Instead of reviewing the historical recognition of the rights of a natural parent—rights likely to find ample historical support—the Court narrowed its view to consideration of whether there was an historical acknowledgment of rights of a natural parent of a child conceived through an adulterous affair.[169] Not surprisingly, the Court found no cases recognizing this right.[170]

In his dissent from the plurality opinion in *Michael H.*, Justice Brennan criticized the Court for limiting its scope to such a specific right.[171] This approach, expressed Justice Brennan, was out of step with the Court's other cases regarding fundamental liberty interests.[172] The proper approach would have been to discuss "whether *parenthood* is an interest that historically has received our attention and protection; the answer to that question is too clear for dispute."[173]

The way in which the Court defines the right reviewed in this case will undoubtedly affect the ultimate conclusion. Had the *Roe* Court considered whether abortion was a liberty interest rooted in historical protection, it is doubtful that the practice would have received approval.[174] By focusing instead on the more broadly construed right to personal privacy,

---

166. 491 U.S. 110 (1989).

167. *Id.* at 130.

168. *Id.* at 130-32.

169. *Id.* at 126-27.

170. *Id.* at 127. Justice Scalia, author of the plurality decision, declared, "This is not the stuff of which fundamental rights qualifying as liberty interests are made." *Id.*

171. *Id.* at 139 (Brennan, J., dissenting); *see also* Gail A. Secor, Michael H. v. Gerald D.: *Due Process and Equal Protection Rights of Unwed Fathers*, 17 HASTINGS CONST. L.Q. 759, 780-81 (1990) (discussing Justice Scalia's narrow focus in *Michael H.*).

172. *Michael H.*, 491 U.S. at 139 (Brennan, J., dissenting); *see also* Mary Kay Kisthardt, *Of Fatherhood, Families and Fantasy: The Legacy of* Michael H. v. Gerald D., 65 TUL. L. REV. 585, 586 (1991) (suggesting that the *Michael H.* decision is inconsistent with the Court's other parenthood decisions).

173. *Michael H.*, 491 U.S. at 139 (Brennan, J., dissenting) (emphasis added). The court decided that question in *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

174. *See supra* notes 152-56 and accompanying text.

the Court avoided the negative historical evidence that would have assuredly defeated the due process challenge.[175]

Similarly, had the *Bowers* Court set its sights on the right to privacy, recognized by the Court in *Griswold v. Connecticut* to uphold a married couple's right to make contraceptive choices,[176] the result may have been drastically different. By focusing on the much more circumscribed question of whether history supports a recognition of a homosexual individual's right to engage in acts of sodomy, the Court was able to deny protection and apply a lower degree of scrutiny to laws prohibiting the practice.[177]

If the Court approaches the right to die as falling under the right to privacy recognized by *Griswold* and *Roe*, the chance that the right will be protected as a fundamental liberty interest is great.[178] If the Court takes a more limited approach, however, and searches for historical support for the right to physician-assisted suicide, it is unlikely that the right will find constitutional protection.

E. Coming Full Circle

"To every thing there is a season, and a time to every purpose under the heaven: A time to be born, and a time to die . . . ."[179] A finding that a mentally competent, terminally ill individual has a protected liberty interest in dying with dignity through the assistance of a physician is not a stretch of the liberty interests already recognized by the Court. There exists a protected liberty interest in marriage,[180] procreation,[181] abortion and contraception,[182] child rearing,[183] education,[184] and the

175. *See supra* notes 45-47 and accompanying text.
176. 381 U.S. 479, 485-86 (1965).
177. *See* Bowers v. Hardwick, 478 U.S. 186, 191-95 (1986).
178. *See* Roe v. Wade, 410 U.S. 113, 153 (1973); Griswold, 381 U.S. at 483.
179. *Ecclesiastes* 3:1.
180. Loving v. Virginia, 388 U.S. 1, 2 (1967) (holding a Virginia law prohibiting interracial marriages invalid).
181. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (holding a Massachusetts law prohibiting the distribution of contraceptives to unmarried persons unconstitutional); Skinner v. Oklahoma, 316 U.S. 535, 543 (1942) (finding act requiring the sterilization of habitual criminals unconstitutional).
182. *Roe*, 410 U.S. at 153; *Griswold*, 381 U.S. at 485.
183. Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (recognizing a parental right to make child rearing decisions).
184. Meyer v. Nebraska, 262 U.S. 390, 391 (1923) (determining that a law forbidding the teaching of any modern language other than English before the eighth grade vio-

rejecting of life-sustaining medical treatment.[185] The right to personal autonomy and rejection of unwanted governmental interference begins with the intensely individual choice to create life, and it should end with the equally personal decision to end life, while encompassing the rights to education and marriage. The Court's recognition that there is a fundamental right for a terminally ill individual to choose the time and manner of death will bring us full circle in the liberty arena.

V. CONCLUSION

If the Court extends constitutional protection to the right for mentally competent, terminally ill adults to seek the aid of physicians to administer or prescribe life-ending drugs, the exact scope of the right will likely be a question suffusing our courts for the next twenty-five years.[186] That opportunity will properly allow the states to structure the right to fit with their own individualized policies and procedures, which may differ from other states.[187] By taking the issue of physician-assisted suicide for review, the Court has given itself an opportunity to provide or deny great relief to a growing population of suffering individuals.[188] Regardless of the Court's decision, the issue, like the problem of terminal illness, will not soon disappear.[189]

JENNIFER COLE POPICK

---

lated the Fourteenth Amendment).

185. Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 278 (1990).

186. "'If the Court recognizes a constitutional right for terminally ill adults, within a year, [there will be] 50 lawsuits to stretch the outer limits of this right.'" Hinz, *supra* note 101, at *2 (quoting commentator and Professor Yale Kamisar, Clarence Darrow Distinguished University Professor at the University of Michigan Law School).

187. *See Cruzan*, 497 U.S. at 292 (1990) (O'Connor, J., concurring) (citing New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). Justice O'Connor expressed that "the more challenging task of crafting appropriate procedures for safeguarding . . . liberty interests is entrusted to the 'laboratory' of the States." *Id.*

188. *See supra* notes 10-14 and accompanying text.

189. Compassion in Dying v. Washington, 79 F.3d 790, 796 (9th Cir.) (noting, with regret, that terminal illness will always be with us), *cert. granted sub nom.*, Washington v. Glucksberg, 117 S. Ct. 37 (1996).