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WASHINGTON V. GLUCKSBERG WAS TRAGICALLY WRONG

Erwin Chemerinsky*

Properly focused, there were two questions before the Supreme Court in Washington v. Glucksberg. First, in light of all of the other non-textual rights protected by the Supreme Court under the “liberty” of the Due Process Clause, is the right to assisted death a fundamental right? Second, if so, is the prohibition of assisted death necessary to achieve a compelling interest? Presented in this way, it is clear that the Court erred in Washington v. Glucksberg. The right of a terminally ill person to end his or her life is an essential aspect of autonomy, comparable to aspects of autonomy that the Court has protected in decisions concerning family autonomy, reproductive autonomy, and autonomy to engage in sexual activity. Moreover, the government’s general interest in protecting life and preventing suicide has far less force when applied to a terminally ill patient. The tragedy of Washington v. Glucksberg is that every day across the country, terminally ill patients are being forced to suffer longer and being denied an essential aspect of their autonomy and personhood.

INTRODUCTION

Fourteen years ago, in the spring of 1993, my father was dying of terminal lung cancer. Near the end of his life, he was in the hospital, far too weak to get out of bed or even to shave. Except when sedated, he was fully conscious and completely rational. He completely understood that he was in the last days of his life and that he would never get out of that hospital bed. I stood next to him as he asked a doctor to administer drugs to end his life. He cogently explained to the doctor that either he was awake and in great pain or he was drugged into unconsciousness. He told the doctor that it was his time to go and there was no point in prolonging his life a few more days. No one in my family objected to his choice.

The doctor brusquely said, “I can’t do that,” and quickly changed the subject. My father, though, was persistent and again asked the doctor to give him enough morphine to stop his breathing and end his suffering. The doctor said that the law did not allow that and that he would not discuss it further.

My father died four days after making that request. I will never understand what interest the State of Indiana, where he was in the hospital, had in

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keeping him alive for those few additional days. He was awake for increasingly short intervals and while awake he complained of great pain. The tumor had blocked circulation to his arm and it was grotesquely swollen. He did not see any point in having an amputation since he was about to die. He told the doctor that at that stage it did not matter to him whether he died of gangrene from the death of tissue in his arm or from the lung cancer.

I cannot approach the topic of physician-assisted suicide without confronting the vivid image of my father pleading with a doctor to help him stop suffering. The prohibition of physician-assisted suicide affects those like my father who are not on life support and are physically too weak to commit suicide. Those on artificial life support can order it ended.¹ Those with the physical ability to do so can commit suicide, albeit with far greater trauma to their family and loved ones. But a person like my father, who desperately wanted to end his suffering, was left with no alternatives. Thankfully, he only lingered for a few days after his request; but there are many terminally ill patients who suffer for months because of the lack of a right to death with dignity.

Three years after my father died in 1993, the United States Court of Appeals for the Ninth Circuit, in an *en banc* ruling, found that the right to privacy included a right to physician-assisted suicide. In a lengthy and carefully reasoned opinion by Judge Stephen Reinhardt, the court, in a seven-to-four decision, ruled in favor of terminally ill patients in the State of Washington who were challenging the law prohibiting aiding or abetting a suicide.² Almost simultaneously, the United States Court of Appeals for the Second Circuit found that a similar New York law violated equal protection.³

A year later, the Supreme Court reversed both of these decisions and emphatically rejected any constitutional right to physician-assisted suicide.⁴ The majority opinion in each of these cases was written by Chief Justice Rehnquist and joined by Justices O'Connor, Scalia, Kennedy, and Thomas. Justices Stevens, Souter, Ginsburg, and Breyer concurred in the judgment. There were no dissents.

In this Article, I argue that the Supreme Court was wrong, tragically wrong, in its decisions in *Washington v. Glucksberg* and *Vacco v. Quill*. As I assess these cases and assisted death, there are two questions to be answered. First, should the right to privacy under the Constitution, which had been recognized in prior cases, be interpreted to include a fundamental right to assisted death for terminally ill patients? Second, if so, is the prohibition of assisted death necessary to meet a compelling government interest?

1. In *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 279 (1990), the Court "assumed;" and five Justices expressly found, that there is a right to refuse medical treatment under the Due Process Clause. See *infra* notes 28–30 and accompanying text.

2. *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) (*en banc*), *rev'd sub nom.* *Washington v. Glucksberg*, 521 U.S. 702 (1997).

3. *Vacco v. Quill*, 80 F.3d 716 (2d Cir. 1996), *rev'd*, 521 U.S. 793 (1997).

4. *Glucksberg*, 521 U.S. 702; *Quill*, 521 U.S. 793.

The Supreme Court's crucial error was in failing to recognize that the prohibition of assisted death infringes a fundamental aspect of the right to privacy. Thus, the Court used only rational basis review, rather than strict scrutiny. Had it applied the latter, it should have found that none of the government's alleged interests met the demanding requirements of strict scrutiny.

The tragedy of the Supreme Court's decision is that countless other individuals in my father's situation needlessly suffer every day across the country. They are denied the most basic aspect of their autonomy: the power to decide to end their life with dignity and on their own terms.

In Part I, I explain why the Supreme Court was wrong in failing to find that a fundamental right was implicated. In Part II, I describe why laws prohibiting assisted dying for terminally ill patients fail strict scrutiny.⁵

I. LAWS PROHIBITING ASSISTED DEATH INFRINGE THE RIGHT TO PRIVACY

There are two key steps to the argument that laws prohibiting assisted death infringe the right to privacy. First, the Constitution protects fundamental aspects of personal autonomy, even though privacy and these rights are not enumerated in the Constitution. Second, the right to assisted dying—a right to die with dignity—is a core aspect of the personal autonomy protected under the Constitution's right to privacy.

The first step is controversial, but as a constitutional matter, not difficult. Conservative Justices consistently maintain that there is no right to privacy protected by the Constitution because it is not mentioned in the text and was not intended by the framers.⁶ But long before the Supreme Court considered physician-assisted suicide, it held that privacy is protected as a fundamental right under the Constitution, and it safeguarded many aspects of autonomy as fundamental rights. For example, the Court has expressly held that certain aspects of family autonomy are fundamental rights and that government interference will be allowed only if it withstands strict scrutiny. These liberties include the right to marry,⁷ the right to custody of one's children,⁸ the

5. My focus, like that of the Supreme Court in *Glucksberg* and *Quill*, is on the right to physician-assisted suicide for terminally ill patients. In Part II, I consider whether this inevitably would mean a right to physician-assisted suicide in other contexts.

6. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 91–92 (2000) (Scalia, J., dissenting) (disputing any constitutional protection for the right of parents to control the upbringing of their children); *Cruzan*, 497 U.S. at 293 (Scalia, J., concurring) (disputing constitutional protection for the right to refuse medical treatment).

7. E.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (speaking of a fundamental right to marriage).

8. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982) (“[A] natural parent’s desire for and right to the companionship, care, custody, and management of his or her children is an interest far more precious than any property right.” (internal quotation marks omitted)); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (“The rights to conceive and to raise one’s children have been deemed ‘essential,’ ‘basic civil rights of man,’ and ‘[r]ights far more precious . . . than property rights.’” (alteration in original) (citations omitted)).

right to keep a family together,⁹ and the right to control the upbringing of one's children.¹⁰ Similarly, the Court has recognized a right to reproductive autonomy, which includes the right to procreate,¹¹ the right to purchase and use contraceptives,¹² and the right to abortion.¹³

Unless the Court intended to overrule all of these decisions, it was clear at the time of *Glucksberg* that the Constitution was interpreted as protecting basic aspects of personal autonomy as fundamental rights even though they are not mentioned in the text of the document. Put another way, the Court never has adopted the originalist position of Justices like Scalia and Thomas that the Constitution's meaning is limited to its original meaning.¹⁴ As I and others have argued elsewhere, and there is no need to repeat here, there are compelling reasons to reject an originalist approach to the Constitution.¹⁵ Moreover, scholars have developed persuasive arguments as to why privacy is worthy of constitutional protection as a fundamental right.¹⁶

In *Glucksberg*, Chief Justice Rehnquist's majority opinion formulated an approach to identifying fundamental rights that is at odds with the Supreme Court's approach in its earlier privacy cases. Chief Justice Rehnquist wrote that "we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'"¹⁷ Further, he gave decisive weight to history and tradition:

9. See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (declaring it unconstitutional for a zoning ordinance to keep a grandmother from living with her two grandsons who were first cousins).

10. E.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

11. See, e.g., *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (invalidating a state law that mandated involuntary sterilization of those convicted three times of crimes involving moral turpitude).

12. E.g., *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

13. E.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).

14. Moreover, conservative Justices seem quite willing to depart from the original meaning of a constitutional provision when it conflicts with their ideology. For example, conservative Justices interpret the Fourteenth Amendment as requiring colorblindness by the government. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007). But it is clear that the original understanding of the Fourteenth Amendment, especially based on the actions of the Congress that proposed it, was to allow race-conscious government actions, especially to benefit minorities. See Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 Nw. U. L. REV. 477, 570-87 (1998) (describing the actions of the Congress that proposed the Fourteenth Amendment).

15. See, e.g., ERWIN CHERMERINSKY, *INTERPRETING THE CONSTITUTION* (1987); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

16. For a superb defense of the right to privacy as a fundamental right, see Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989).

17. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

The history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it. That being the case, our decisions lead us to conclude that the asserted "right" to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause.¹⁸

However, this assumption that a fundamental right exists only if there is a tradition of protecting it is wrong both descriptively and normatively. Descriptively, the Court has been willing to protect rights even though there has not been a tradition of protection. For example, laws prohibiting interracial marriage were far more "deeply rooted in this Nation's history and tradition" than the right to interracial marriage, but in *Loving v. Virginia*, the Court held that such a right is protected by the Due Process Clause.¹⁹ And there was no deeply rooted tradition of protecting a right to abortion before *Roe v. Wade*. In fact, abortion was illegal in forty-six states when *Roe* was decided.²⁰

Of course, conservatives can argue that is why these decisions were wrong. But that misses the point: Chief Justice Rehnquist purports to describe how the Court has acted in determining whether an unenumerated right is protected by the Constitution. His description is inaccurate. There could be a different discussion about whether the Court should protect such rights, but as a descriptive matter, he is just wrong in saying that due process is limited to protecting those rights that are "objectively, 'deeply rooted in this Nation's history and tradition.'"²¹

Although this formulation is familiar and often uttered, it does not reflect the non-textual rights protected by the Court, especially under the rubric of privacy rights.

Normatively, the fact that laws have long existed does not answer the question as to whether the interest the laws regulate is so integral to personhood as to be worthy of being deemed a fundamental right. Oliver Wendell Holmes expressed this well:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.²²

Indeed, the Court's subsequent decision in *Lawrence v. Texas*²³ provides strong support for Justice Holmes's point. In *Lawrence*, the Court invalidated laws prohibiting private, consensual homosexual activity, even though such statutes had existed throughout American history. Contrary to Chief

18. *Id.* at 728.

19. 388 U.S. 1 (1967).

20. Erwin Chemerinsky, *Rationalizing the Abortion Debate: Legal Rhetoric and the Abortion Controversy*, 31 *BUFF. L. REV.* 107, 109 (1982).

21. *Glucksberg*, 521 U.S. at 720–21 (quoting *Moore*, 431 U.S. at 503).

22. O.W. Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457, 469 (1897).

23. 539 U.S. 558 (2003).

Justice Rehnquist's approach in *Glucksberg*, the Court in *Lawrence* protected a privacy right even though it was not based in the text, the framers' intent, or tradition. The methodology of *Lawrence*, which affirmed a right to privacy based on its being a crucial aspect of personhood, cannot be reconciled with Chief Justice Rehnquist's restrictive view of rights under the Due Process Clause.

Thus, it is the second step in the analysis that is key: is the right to physician-assisted suicide so fundamental to autonomy that it should be deemed a fundamental right? Put another way, is it sufficiently analogous in its importance to the privacy rights which the Court has previously protected that the right should be worthy of being deemed a fundamental right?

It was striking that not one of the nine Justices on the Court made this argument. Four Justices—Stevens, Souter, Ginsburg, and Breyer—wrote concurring opinions to emphasize that laws prohibiting physician-assisted suicide might be unconstitutional as applied.²⁴ But none of the Justices argued that there should be a fundamental right to physician-assisted suicide.²⁵

The Ninth Circuit, however, did raise precisely this argument. In its en banc ruling striking down the Washington statute prohibiting aiding and abetting a suicide, the Ninth Circuit persuasively explained why privacy should be seen as including a right to death with dignity:

Some argue strongly that decisions regarding matters affecting life or death should not be made by the courts. Essentially, we agree with that proposition. In this case, by permitting the *individual* to exercise the right to *choose* we are following the constitutional mandate to take such decisions out of the hands of the government, both state and federal, and to put them where they rightly belong, in the hands of the people. 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. The Constitution and the courts stand as a bulwark between individual freedom and arbitrary and intrusive governmental power. Under our constitutional system, neither the state nor the majority of the people in a state can impose its will upon the individual in a matter so highly "central to personal dignity and autonomy." Those who believe strongly that death must come without physician assistance are free to follow that creed, be they doctors or patients. They are not free, however, to force their views, their religious convictions, or their philosophies on all the other

24. See, e.g., *Glucksberg*, 521 U.S. at 792 (Breyer, J., concurring).

25. It is interesting to speculate as to why not. In part, it may be a reflection of the composition of the Court. I believe, though I cannot prove, that William Brennan, Thurgood Marshall, William Douglas, or even Harry Blackmun would have argued differently. The Court at the time of *Glucksberg* did not have (and does not have today) a liberal in the mold of these earlier Justices.

Moreover, the failure of any Justice to urge such a right is a reflection of the influence of the conservative attack on unenumerated rights. The conservatives' relentless drumbeat against privacy rights has had an effect, even though it is inconsistent with numerous precedents and is based on a thoroughly criticized approach to constitutional interpretation.

members of a democratic society, and to compel those whose values differ with theirs to die painful, protracted, and agonizing deaths.²⁶

The Ninth Circuit is correct: if privacy means anything, it is the right of individuals to have the autonomy to make crucial decisions concerning their lives. The Supreme Court has protected these crucial decisions in a human being's life by recognizing rights such as the right to marry, the right to raise children, and the right to reproductive autonomy. Certainly, the choice of whether to live or to die is of equal importance. Indeed, it is difficult to imagine any aspect of autonomy more basic than the ability to choose whether to continue one's life. If any aspect of autonomy is to be deemed fundamental, surely it is the right to choose to die. It is important to recognize that this is the type of reasoning courts always engage in, looking to prior decisions and deciding whether the current matter is sufficiently analogous. In *Glucksberg*, the essential question—and one not faced by the majority—was whether the right to assisted death is comparable in its importance in a person's life to other aspects of liberty already protected.

This conclusion is further supported by the opinions in *Cruzan v. Director, Missouri Department of Health*.²⁷ Under *Cruzan*, those who are on life support have the right to have it ended. In other words, they have the right to assisted dying under the Constitution. Chief Justice Rehnquist's majority opinion in *Cruzan* declared that "for purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition."²⁸ Although the majority opinion only "assume[d]" that there was a right to refuse food and water to bring about death, five Justices in *Cruzan*—Justice O'Connor, concurring, and the four dissenting Justices—said that such a right exists. Justice O'Connor began her opinion by saying, "I agree that a protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions . . . and that the refusal of artificially delivered food and water is encompassed within that liberty interest."²⁹ Justice Brennan, in a dissenting opinion joined by Justices Marshall and Blackmun, said that there is a "fundamental right to be free of unwanted artificial nutrition and hydration."³⁰ And Justice Stevens, who also dissented, described the case as involving "constitutional interests of the highest order."³¹

In other words, five Justices in *Cruzan* clearly found that there is a fundamental right of competent adults to refuse medical treatment. As the following analysis will show, this is in substance a right to

26. *Compassion in Dying v. Washington*, 79 F.3d 790, 839 (9th Cir. 1996) (en banc), *rev'd sub nom. Glucksberg*, 521 U.S. 702 (citation omitted).

27. 497 U.S. 261 (1990).

28. *Cruzan*, 497 U.S. at 279.

29. *Id.* at 287 (O'Connor, J., concurring) (citation omitted).

30. *Id.* at 302 (Brennan, J., dissenting).

31. *Id.* at 344 (Stevens, J., dissenting).

physician-assisted suicide for any patient who is on artificial life support. But those not on artificial life support are denied this right.

In *Vacco v. Quill*, the Supreme Court said that there is a distinction between withdrawing treatment and administering drugs to end a person's life. Chief Justice Rehnquist wrote that "the overwhelming majority of state legislatures have drawn a clear line between assisting suicide and withdrawing or permitting the refusal of unwanted lifesaving medical treatment by prohibiting the former and permitting the latter."³² Yet, on reflection, this line is anything but clear. Both involve affirmative acts by physicians. Turning off a respirator, removing a feeding tube, stopping medication that keeps a person's blood pressure at a level to sustain life; all are affirmative acts. Both are intended to end a person's life—and both will have that effect. The Rehnquist argument invokes a familiar distinction between omission and commission, but this distinction is inapposite here because ending treatment and administering substances to end life are both acts of commission with the same purpose and effect.

The conclusion that assisted dying is a fundamental right does not make state laws that prohibit aiding and abetting a suicide per se unconstitutional. But it does say that they should be allowed only if they survive strict scrutiny. This qualification is crucial because the level of scrutiny is key to determining the constitutionality of a law. The Supreme Court in *Washington v. Glucksberg* used only rational basis review because it concluded that there was not a fundamental right.³³ Similarly, in *Vacco v. Quill*, the Supreme Court rejected the plaintiff's equal protection claim on the ground that there was not a fundamental right and proceeded to apply rational basis review.³⁴

The Court's approach cannot be reconciled with the many prior Supreme Court cases protecting unenumerated rights as fundamental. If there is constitutional protection for autonomy, as there has been since the early twentieth century, then there must be a fundamental right to death with dignity as well. And once a fundamental right to physician-assisted suicide is recognized, the key question, under either due process or equal protection analysis, is whether the government meets strict scrutiny: are laws prohibiting physician-assisted suicide necessary to achieve a compelling interest?

II. LAWS PROHIBITING ASSISTED DEATH FAIL STRICT SCRUTINY

The State of Washington in *Glucksberg* and the State of New York in *Quill* asserted a number of interests to support their laws prohibiting aiding and abetting a suicide. The Ninth Circuit and the Supreme Court each ad-

32. *Vacco v. Quill*, 521 U.S. 793, 804–05 (1997).

33. *See supra* note 18 and accompanying text.

34. *Quill*, 521 U.S. 793. Chief Justice Rehnquist wrote, "New York's statutes outlawing assisting suicide affect and address matters of profound significance to all New Yorkers alike. They neither infringe fundamental rights nor involve suspect classifications. These laws are therefore entitled to a 'strong presumption of validity.'" *Id.* at 799–800 (citations omitted).

dressed six specific interests: "(1) preserving life; (2) preventing suicide; (3) avoiding the involvement of third parties and use of arbitrary, unfair, or undue influence; (4) protecting family members and loved ones; (5) protecting the integrity of the medical profession; and (6) avoiding future movement toward euthanasia and other abuses."³⁵ On careful examination, both the Washington law and the New York law fail strict scrutiny.

First, the states asserted that they have an interest in preserving life. In *Cruzan*, the Court stated that "we think a State may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life."³⁶ The Court in *Glucksberg* quoted this statement: "Washington has an 'unqualified interest in the preservation of human life.' The State's prohibition on assisted suicide, like all homicide laws, both reflects and advances its commitment to this interest."³⁷

Undoubtedly, in the abstract, preserving human life is a compelling government interest. But context is crucial. The question is whether the state has a compelling interest in prolonging lives of terminally ill patients who wish to die. A terminally ill patient, by definition, will die relatively soon. With terminally ill patients, denying physician-assisted suicide likely will mean that the person stays alive additional days, weeks, or at most months. With non-terminally ill patients, denying assisted dying will mean that the person likely will live many more years or even decades. Thus, a distinction can be drawn based on the difference in the state's interests. Moreover, the Supreme Court, Washington, and New York had all previously recognized that their interest in preserving life was not sufficient to prevent people from terminating medical treatment, which would end their lives. Thus, the question is not whether, in general, the state has a compelling interest in protecting human life. Rather, the inquiry must be more specific: in light of the constitutional and statutory rights to stop medical interventions so as to end a person's life, does the state have a compelling interest in prolonging the life of a terminally ill patient against his or her wishes?

Put this way, the government's interest is far weaker. I never have understood what interest was served in keeping my father alive for several more days after he clearly and unequivocally expressed the desire that his suffering end. The Ninth Circuit explained this well:

As the laws in state after state demonstrate, even though the protection of life is one of the state's most important functions, the state's interest is dramatically diminished if the person it seeks to protect is terminally ill or permanently comatose and has expressed a wish that he be permitted to die without further medical treatment (or if a duly appointed representative has done so on his behalf). When patients are no longer able to pursue liberty or happiness and do not wish to pursue life, the state's interest in forcing them to remain alive is clearly less compelling. Thus, while the state may

35. *Washington v. Glucksberg*, 521 U.S. 702, 728 n.20 (1997).

36. *Cruzan*, 497 U.S. at 282.

37. *Glucksberg*, 521 U.S. at 728 (quoting *Cruzan*, 497 U.S. at 282).

still seek to prolong the lives of terminally ill or comatose patients or, more likely, to enact regulations that will safeguard the manner in which decisions to hasten death are made, the strength of the state's interest is substantially reduced in such circumstances.³⁸

Second, in writing for the Court, Chief Justice Rehnquist addressed the government's interest in preventing suicide:

Relatedly, all admit that suicide is a serious public-health problem, especially among persons in otherwise vulnerable groups. . . .

Those who attempt suicide—terminally ill or not—often suffer from depression or other mental disorders. . . . Thus, legal physician-assisted suicide could make it more difficult for the State to protect depressed or mentally ill persons, or those who are suffering from untreated pain, from suicidal impulses.³⁹

But again, the Court states the issue at too high a level of abstraction. The question is not whether the state has an interest in preventing suicide; obviously as a general matter it does. Instead the question is much more specific: does the state have a compelling interest in preventing terminally ill patients from being assisted in their death? Phrased this way, the argument collapses into the prior point that the state has a compelling interest in safeguarding life.

There is a danger that people will use assisted death out of temporary depression. This is why it is a much more troubling issue as to whether the right should extend beyond the terminally ill. The autonomy argument for physician-assisted suicide would seemingly justify all individuals having such a right. But the state unquestionably has more of an interest in preventing the suicide and protecting the life of a person who is not terminally ill. Indeed, in such circumstances the state's interest is quantitatively different in terms of the length of life that is being extended, and likely qualitatively different in terms of the nature of that life. The issue, though, in *Washington v. Glucksberg* was just as to whether terminally ill individuals had the right to assisted dying. The state has no meaningful interest in preventing assisted death of a person suffering terribly from a terrible disease. In fact, as explained above, states already allow assisted dying by such individuals if they are on artificial life support.

Moreover, Judge Richard Posner has argued that "permitting physician-assisted suicide . . . [in] cases of physical incapacity might actually *reduce* the number of suicides and *postpone* the suicides that occur."⁴⁰ The Ninth Circuit paraphrased his conclusion:

[A]ssuring such individuals that they would be able to end their lives later if they wished to, even if they became totally physically incapacitated,

38. *Compassion in Dying v. Washington*, 79 F.3d 790, 820 (9th Cir. 1996) (en banc), *rev'd sub nom. Glucksberg*, 521 U.S. 702.

39. *Glucksberg*, 521 U.S. at 730–31.

40. RICHARD A. POSNER, *AGING AND OLD AGE* 244 (1995).

would deter them from committing suicide now and would also give such people a renewed peace of mind. . . . [S]ome of those individuals would eventually commit suicide but others would decide never to do so.⁴¹

Judge Posner suggests that there might be another situation, besides for the terminally ill patient, where physician-assisted suicide should be recognized: a person facing a debilitating disease that denies them meaningful quality of life. This, too, is a hard question, but one that the Court did not need to resolve in *Washington v. Glucksberg*.

The third interest identified by the government is in protecting the integrity of the medical profession. Chief Justice Rehnquist stated, "The State also has an interest in protecting the integrity and ethics of the medical profession. . . . [T]he American Medical Association, like many other medical and physicians' groups, has concluded that '[p]hysician-assisted suicide is fundamentally incompatible with the physician's role as healer.'"⁴²

But it is not clear why this rises to the level of a compelling government interest. Each doctor can and would decide for himself or herself whether to assist a person in dying. Recognizing a constitutional right to assisted dying would not keep doctors from deciding whether and when to participate. There is a constitutional right to abortion, but no doctor is ever required to perform an abortion. Also, the argument is based entirely on an inapposite definition: the doctor's role is to be a "healer." But that does not help in dealing with situations where there is a terminally ill patient and no healing to be done. In such situations, isn't the doctor's primary role to reduce suffering, to make the patient as comfortable as possible? In this situation, then, physician-assisted suicide advances the central goal of the doctor.

This argument also ignores the extent to which doctors already participate in assisted dying. Some do this by ending essential medical care. Others may prescribe heavy doses of sedatives knowing that they will hasten the end of their patients' lives. A constitutional right to physician-assisted suicide will provide regulation for this practice. The summer that *Glucksberg* was decided, I participated in a debate over it with a doctor. He said that there were numerous instances in which he had administered drugs to alleviate pain knowing that the amount provided would end the person's life. Yet he also argued that protecting the medical profession required prohibiting physician-assisted suicide. He did not see what to me was an obvious tension in his position. He believed that doctors already can and do provide physician-assisted suicide, so there was no need for the law to do so. This point, however, undermines not only the concern for protecting the medical profession but the entire case against allowing assisted dying. If doctors already do this, and unquestionably they do, then surely it is better that it be covered by rules and procedures? Moreover, shouldn't all terminally ill patients have the opportunity for the exercise of this option? Also, again, once doctors are allowed to engage in assisted death by removing life support, there is no

41. *Compassion in Dying*, 79 F.3d at 824 n.98 (citing POSNER, *supra* note 40, at 243–53).

42. *Glucksberg*, 521 U.S. at 731.

reason why protecting the medical profession needs to be protected from what the plaintiffs in *Glucksberg* were requesting.

Fourth, the Court said that the government has an interest in preventing vulnerable individuals from being pressured into ending their lives. The Court explained:

[T]he State has an interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes. . . . We have recognized . . . the real risk of subtle coercion and undue influence in end-of-life situations. . . . If physician-assisted suicide were permitted, many might resort to it to spare their families the substantial financial burden of end-of-life health-care costs.⁴³

This is a serious concern, but the question must be whether the government has a compelling interest in preventing everyone from exercising a right to physician-assisted suicide because some might be pressured into ending their lives earlier than they wish. The analogy to abortion rights is apt. Recognizing a right to abortion might make some women, especially poor women, feel pressured into having abortions. But the Supreme Court has recognized that it is the right of each woman to decide whether to have an abortion. By the same reasoning, a competent adult with a terminal illness should not be denied the right to physician-assisted suicide because some other individuals will make poor choices because of pressure and influence.

Indeed, the same concern can be raised about the right to refuse medical care. A person could choose to terminate treatment because of pressure from family members or to reduce their emotional or financial burdens. Notwithstanding this concern, the Court recognized a right to refuse medical care in *Cruzan*.⁴⁴ There is no reason why the concern is weightier or more powerful in the context of physician-assisted suicide.

Besides, if the concern is pressure, the solution should be to lessen the risk of pressure, not to prohibit assisted dying. And if the government is concerned that individuals might feel pressure to save their families from large expenses, then the government should ensure that the costs of medical care are adequately covered.

Finally, the Court accepted the State of Washington's argument that "the State may fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia."⁴⁵ Yale Kamisar has persuasively made this argument.⁴⁶ The Court invoked the experience in the Netherlands, where it said that a study found 4,941 cases where physicians

43. *Id.* at 731–32.

44. *See supra* notes 28–31 and accompanying text.

45. *Glucksberg*, 521 U.S. at 732.

46. Yale Kamisar, *Against Assisted Suicide — Even a Very Limited Form*, 72 U. DET. MERCY L. REV. 735 (1995); Yale Kamisar, *The "Right to Die": On Drawing (and Erasing) Lines*, 35 DUQ. L. REV. 481 (1996).

administered lethal morphine overdoses without the patients' explicit consent.⁴⁷

But this argument has the same problems as all other arguments against the existence of a right because that right might be abused. It has all the problems of a typical "slippery slope" argument. To recognize a right to assisted dying for competent, terminally ill patients does not as a matter of necessity lead to a right to physician-assisted suicide for others. Lines can be drawn. For instance, the right can be limited to terminally ill patients. As explained below, Oregon law in allowing physician-assisted suicide by terminally ill patients has drawn exactly this distinction for over a decade.

I recognize that the autonomy arguments for physician-assisted suicide for terminally ill patients also can be used to justify a right to physician-assisted suicide for non-terminally ill patients. If a terminally ill patient has the right, why not a person with a medical condition that causes unremitting pain but that will not hasten the end of the person's life? Why limit this to physical conditions; what of the person who is devastatingly depressed and wants to end his or her life in a way least likely to impose on family members? If a person's autonomy includes the right to end one's life painlessly and with the aid of a physician, why doesn't every competent adult have this right?

These are serious and troubling questions, but answering them does not require rejecting a right to assisted death for terminally ill patients. It certainly is possible to draw a line and conclude that a terminally ill patient is different because his or her death is reasonably imminent. A terminally ill patient, by definition, will lose much less of his or her life through physician-assisted suicide than would a non-terminally ill patient who commits suicide.

The Court should not deny a right to some because others might abuse it. Freedom of speech can be used to impose great pain and social harms, yet that is not a reason for censorship. The right of parents to control the upbringing of their children might lead to physical abuses beyond the reach of the law. But these inevitable abuses are not reasons to deny the existence of the parents' right.

Moreover, there now has been a decade of experience in Oregon with legal assisted death. The Oregon experience provides powerful refutation of this and many of the arguments against assisted dying. Oregon law allows physicians to prescribe, but not administer, medications that can be used to end life. Several requirements must be met before a physician-assisted suicide can be carried out:

The law requires that a person requesting a prescription for lethal medication: 1) is an adult; 2) is capable; 3) is a resident of Oregon; 4) "has been determined by the attending physician and consulting physician to be suffering from a terminal disease"; 5) "has voluntarily expressed his or her wish to die"; and 6) "make[s] a written request for medication for the

47. *Glucksberg*, 521 U.S. at 734.

purpose of ending his or her life in a humane and dignified manner in accordance with [Oregon Revised Statutes Sections] 127.800 to 127.897.”⁴⁸

The Oregon statute prescribes a number of steps that must be followed and which are designed to minimize the risk of abuse. The Oregon Department of Human Services describes them as follows:

- [1.] The patient must make two oral requests to his or her physician, separated by at least 15 days.
- [2.] The patient must provide a written request to his or her physician, signed in the presence of two witnesses.
- [3.] The prescribing physician and a consulting physician must confirm the diagnosis and prognosis.
- [4.] The prescribing physician and a consulting physician must determine whether the patient is capable.
- [5.] If either physician believes the patient’s judgment is impaired by a psychiatric or psychological disorder, the patient must be referred for a psychological examination.
- [6.] The prescribing physician must inform the patient of feasible alternatives to assisted suicide, including comfort care, hospice care, and pain control.
- [7.] The prescribing physician must request, but may not require, the patient to notify his or her next-of-kin of the prescription request.⁴⁹

The Oregon law gives the lie to the dire predictions of the State of Washington and the Supreme Court. The initiative required data collection and, as of the end of 2005, only 246 Oregonians had been assisted in suicide.⁵⁰ A study of the first decade of implementation found that “[f]ew complications have been reported from Oregon’s assisted suicides; a result inconsistent with data from the Netherlands.”⁵¹ Another commentator noted that “[a]lthough the risks of coercion and abuse of the vulnerable are real, Oregon’s experience demonstrates that such harms have not materialized. Contrary to the suggestion of opponents, the use of [physician-assisted suicide] remains limited and controlled, with no sign of being disproportionately chosen by or forced upon the vulnerable.”⁵²

The Oregon experience shows that procedural safeguards can prevent the abuses that the Court was concerned about in *Glucksberg*. Put in the lan-

48. Kurt Darr, *Physician-Assisted Suicide: Legal and Ethical Considerations*, 40 J. HEALTH L. 29, 39 (2007) (alterations in original) (quoting the Death with Dignity Act § 2.01, OR. REV. STAT. § 127.805 (2005)).

49. OFFICE OF DISEASE PREVENTION & EPIDEMIOLOGY, OR. DEP’T OF HUMAN SERVS., EIGHTH ANNUAL REPORT ON OREGON’S DEATH WITH DIGNITY ACT 7–8 (2006), available at <http://www.oregon.gov/DHS/ph/pas/docs/year8.pdf>.

50. *Id.* at 5.

51. Darr, *supra* note 48, at 43 (footnote omitted).

52. Lindsay N. McAnecley, Comment, *Physician Assisted Suicide: Expanding the Laboratory to the State of Hawai’i*, 29 U. HAW. L. REV. 269, 292 (2006) (footnote omitted).

guage of strict scrutiny, prohibiting all physician-assisted dying is not necessary in order to prevent the abuses.

CONCLUSION

Ultimately, the question in *Washington v. Glucksberg* and *Vacco v. Quill*—and today—is whether the issue of assisted dying should be left to the political process or decided by the courts. The Supreme Court took the former position in *Washington v. Glucksberg* and, in fact, recently upheld the Oregon Death with Dignity Act.⁵³

Why not leave this to the political process? First, as I argue above, the Constitution should be interpreted as including a fundamental right to physician-assisted suicide. Protection of fundamental rights is not left to the political process.

Second, it is notable that although Oregon adopted its death with dignity initiative over ten years ago, no other states have copied this. One possible explanation is that people oppose physician-assisted death for terminally ill patients. Interestingly, though, that is not what opinion polls show. The Ninth Circuit cited public opinion at the time its decision was handed down in 1996:

Polls have repeatedly shown that a large majority of Americans—sometimes nearing 90%—fully endorse recent legal changes granting terminally ill patients, and sometimes their families, the prerogative to accelerate their death by refusing or terminating treatment. Other polls indicate that a majority of Americans favor doctor-assisted suicide for the terminally ill. In April, 1990, the Roper Report found that 64% of Americans believed that the terminally ill should have the right to request and receive physician aid-in-dying. Another national poll, conducted in October 1991, shows that “nearly two out of three Americans favor doctor-assisted suicide and euthanasia for terminally ill patients who request it.” A 1994 Harris poll found 73% of Americans favor legalizing physician-assisted suicide.⁵⁴

Why then has the political process not acted accordingly? I think that the answer is found in the same reason why the vast majority of Americans do not have living wills even though they have strong feelings about what they want done for them in a dire situation. A living will is something easy to put off. Thankfully, there seems no urgency. Creating a living will requires thinking about one’s own mortality. These same human tendencies explain why the political process has not, and likely will not, provide a right to physician-assisted suicide. Maybe, too, those who think about it assume that they will have a sympathetic doctor who will obey their wishes.

53. In *Gonzales v. Oregon*, 546 U.S. 243 (2006), the Court held that the U.S. Department of Justice is not authorized under the Controlled Substances Act to block implementation of the Death with Dignity Act.

54. *Compassion in Dying v. Washington*, 79 F.3d 790, 810 (9th Cir. 1996) (en banc), *rev’d sub nom. Washington v. Glucksberg*, 521 U.S. 702 (1997) (footnotes omitted).

But my father's situation reflects that often people don't have those choices. He did not confront the issue until he was far too weak to end his own life; then, the doctor treating him would not consider my father's request.

Every competent adult facing a terminal disease should be able to die with dignity. The Supreme Court was wrong in *Glucksberg* and *Quill*, and countless individuals and their families have suffered from these decisions ever since.