The Right to Die and the Jurisprudence of Tradition

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Like *Brown v. Board of Education*[1] and *Lochner v. New York*[2] before it, *Roe v. Wade*[3] was the galvanizing constitutional decision of a generation. *Roe* stood for the proposition that federal judges can legitimately decide fundamental questions of social policy on the basis of their own normative judgment, even in the face of nearly unanimous contrary determinations under the positive law of the states.

Much of the constitutional scholarship in the decades after *Roe*, and many of the Court's subsequent decisions, can be seen as a reflection on whether such a power, vested in an unelected judiciary, is legitimate.[4] For the most part, in the years after *Roe*, the courts found reason not to repeat the experiment—even in cases, like *Bowers v. Hardwick*,[5] which presented a more compelling argument for a "privacy" right than that in *Roe*. But decisions in this period were based on their particular facts, and no attempt to articulate an alternative constitutional methodology ever commanded five votes. On the one side, Justice Scalia thundered that the courts were usurping authority that, in our democratic system, belongs to representatives of the people.[6] On the other side, Justices Brennan and Blackmun charged that Scalia and his allies would make the Constitution a

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1 347 U.S. 483 (1954).

2 198 U.S. 45 (1905).

3 410 U.S. 113 (1973).

4 *See* Richard Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 199 (arguing that *Roe* raises "the question whether we have a written constitution"); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973) (representing that *Roe* "is *not* constitutional law and gives almost no sense of an obligation to try to be").

5 478 U.S. 186 (1986).

6 *See, e.g.*, Romer v. Evans, 517 U.S. 620, 629 (1996) (Scalia, J., dissenting); Planned Parenthood v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., dissenting).

"stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past."[7] In the middle, Justices Kennedy and O'Connor would (usually) vote for conservative results without being willing to commit themselves to any particular constitutional methodology.[8]

Last Term, the *Roe* era came to an end. *Washington v. Glucksberg*,[9] together with a companion case under the Equal Protection Clause,[10] squarely presented the question of whether federal courts, exercising the power of judicial review, have authority to resolve contentious questions of social policy on the basis of their own normative judgments. In a soft-spoken opinion by Chief Justice Rehnquist that did not even cite *Roe*, a solid majority of the Court answered "no." The Court announced a constitutional jurisprudence of unenumerated rights under the Due Process Clause based not on the normative judgments of courts, but on constitutional text supplemented by the tradition and experience of the nation. *Roe v. Wade* was not reversed on its facts; the abortion right itself remains secure. But the constitutional methodology under which *Roe* was decided has been repudiated. The era of judicial supremacy epitomized by *Roe* is over.

I. THE CONTEXT AND SIGNIFICANCE OF THE *Glucksberg* DECISION

A. Alternative Approaches to Unenumerated Rights

How should our political community resolve conflicts over fundamental issues of justice and the common good where conscientious citizens of good will do not agree? And in particular, what is the role of the courts? These have been the most persistent questions of constitutional law in this century. Two answers have dominated the debate. The first, associated with Justice Hugo Black

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7 Michael H. v. Gerald D., 491 U.S. 110, 141 (1989) (Brennan, J., dissenting); *see also Bowers*, 478 U.S. at 199–200 (Blackmun, J., dissenting).

8 *See Michael H.*, 491 U.S. at 132 (O'Connor, J., joined by Kennedy, J., concurring) ("I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis."); *Casey*, 505 U.S. at 849 (joint opinion of Justices O'Connor, Kennedy, and Souter) ("The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment.").

9 117 S. Ct. 2258 (1997), *rev'g* Compassion in Dying v. Washington, 79 F.3d 790 (9th Cir. 1996) (en banc).

10 Vacco v. Quill, 117 S. Ct. 2293 (1997), *rev'g* 80 F.3d 716 (2d Cir. 1996). In this Lecture, I will focus on *Glucksberg*.

and, more recently, Judge Robert Bork, is that in the absence of a constitutional norm derived from the text of the Constitution—such as the freedom of speech or the equal protection of the laws—courts have no authority to displace the decisions of the representatives of the people.[11] The command that neither states nor the federal government may "deprive any person of life, liberty, or property, without due process of law,"[12] according to this view, means only that deprivations of life, liberty, or property must be carried out with "due process of law"—meaning properly enacted statutes (or common law) administered according to proper procedures.[13] Due process means "process," and "substantive due process," according to this view, is an oxymoron.[14] Any attempt to go beyond the rights enumerated by the Constitution is judicial usurpation.

At the opposite extreme are those judges and scholars who maintain that the open-ended language of the Constitution is an invitation to judges to decide, on the basis of their "own views about political morality,"[15] what liberties Americans should enjoy, and to limit the power of the government to invade those supposed rights in the absence of what the judges deem to be sufficient reasons. This approach goes by different names. The term "the living Constitution" is associated with the late Justice William J. Brennan, Jr.[16] Professor Lawrence Sager calls it the "justice seeking Constitution."[17] Professor Ronald Dworkin calls it "the Moral Reading" of the Constitution.

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11 *See* Griswold v. Connecticut, 381 U.S. 479, 507–10 (1965) (Black, J., dissenting); ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 118–20 (1990).

12 U.S. CONST. amend. V (federal government); U.S. CONST. amend. XIV (states).

13 *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 191 (1986) (noting that "the language of the Due Process Clauses of the Fifth and Fourteenth Amendments ... appears to focus only on the processes by which life, liberty, or property is taken"); *see also* Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 368–83 (1911).

14 *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 18 (1980).

15 RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 3-4 (1996).

16 The term "the living Constitution" is widely associated with Justice Brennan, even though he did not apparently use the term. *See* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1101 (1990) (referring to "the living Constitution" as "one of the many contributions that have earned Justice Brennan his place as one of the most influential Supreme Court justices in our history"); Arlin M. Adams, *Justice Brennan and the Religion Clauses: The Concept of a "Living Constitution,"* 139 U. PA. L. REV. 1319, 1319 (1991) (noting that Justice Brennan consistently defended the "view of the Constitution as a living and evolving document whose interpretation should not be cabined by too literal a quest for the Framers' intent").

17 Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 417 (1993).

Dworkin summarizes the position as follows:

> Our legal culture insists that judges—and finally the justices of the Supreme Court—have the last word about the proper interpretation of the Constitution. Since the great clauses command simply that government show equal concern and respect for the basic liberties—without specifying in further detail what that means and requires—it falls to judges to declare what equal concern really does require and what the basic liberties really are. But that means that judges must answer intractable, controversial, and profound questions of political morality that philosophers, statesmen, and citizens have debated for many centuries, with no prospect of agreement. It means that the rest of us must accept the deliverances of a majority of the justices . . . .[18]

This makes judging an application of moral philosophy, and for that reason I will call it the "moral philosophic" approach.[19] This is the approach toward constitutional law that gave us *Roe v. Wade*, and it is the approach that underlay the circuit court opinions that announced a right to assisted suicide.[20]

The moral philosophic approach dominated constitutional doctrine during two periods of our history. During the first, at the beginning of this century, the courts embraced a political morality based on selective economic libertarianism, striking down such legislation as minimum wage and maximum hour laws on the ground that they served no objective public purpose.[21] With the New Deal, this period came to an abrupt end and its major precedents were overruled.[22] During the second, which began with the Warren Court,

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18 Ronald Dworkin, *Unenumerated Rights: Whether and How* Roe *Should be Overruled, in* G. STONE ET AL., THE BILL OF RIGHTS IN THE MODERN STATE 381, 383 (1992).

19 Of course, the moral philosophic approach can take many different forms, depending on the philosophy favored by the judiciary at any particular time. As Professor Dworkin has pointed out, it is not the exclusive province of either side of the ideological spectrum. *See id.*

20 Some would say that it is also the approach that gave us *Brown v. Board of Education*, 347 U.S. 483 (1954), but that ignores the powerful case for *Brown* on textual and historical grounds. *See* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

21 *See, e.g.*, Adkins v. Children's Hospital, 261 U.S. 525 (1923); Lochner v. New York, 198 U.S. 45 (1905). For an excellent analysis of this period, see HOWARD GILLMAN, THE CONSTITUTION BESEIGED 147–74 (1993).

22 *See, e.g.*, Olsen v. Nebraska *ex rel.* Western Reference Bond Ass'n, 313 U.S. 236, 244–46 (1941) (overruling Ribnik v. McBride, 277 U.S. 350 (1928)); West Coast Hotel v. Parrish, 300 U.S. 379, 400 (1937) (overruling *Adkins*). *See generally* Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 36–40.

the courts embraced a political morality based on selective social libertarianism, striking down legislation regarding such matters as abortion, contraceptives, and pornography in the home.[23] This period lost its steam with the appointment of new, more conservative Justices by President Ronald Reagan in the 1980s, but as a doctrinal matter there was never a sharp break. In *Bowers v. Hardwick*,[24] in 1986, the Court appeared to abandon the moral philosophic approach. But the narrowness of the decision (5-4), the seeming inadequacy of its reasoning, and the ferocious non-acquiescence by the academy in the legitimacy of the decision made its viability questionable. (The Ninth Circuit, in its assisted suicide opinion, suggested that *Bowers* is an "aberrant" decision that does not command precedential authority.[25]) Indeed, the moral philosophic approach seemed to enjoy a brief revival in *Planned Parenthood v. Casey*,[26] which reaffirmed the right to abortion on the basis, among other things, of the need to define "one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[27] In the end, however, *Casey* was based more on *stare decisis* than on this faux philosophic argument.[28]

In other modern cases, the Court, as is its wont, dealt with questions of unenumerated rights either by divided opinion[29] or in ways that left the underlying jurisprudential conflict unresolved.[30] There was no clear principle upon which lower courts, legislatures, or litigants could rely.

B. The Doctrinal Holding of Washington v. Glucksberg

In *Washington v. Glucksberg*,[31] the Court resolved this doctrinal uncertainty by setting forth a method of interpreting the Due Process Clause that falls between these two extremes. The Court began its doctrinal exposition by rejecting the first position: that the

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23 *See, e.g.*, Roe v. Wade, 410 U.S. 113, 164–66 (1973) (abortion); Eisenstadt v. Baird, 405 U.S. 438, 453–55 (1972) (contraceptives); Stanley v. Georgia, 394 U.S. 557, 566–68 (1969) (pornography).

24 478 U.S. 186 (1986).

25 *See* Compassion in Dying v. Washington, 79 F.3d 790, 813 n.65 (9th Cir. 1996) (en banc), *rev'd sub nom.* Washington v. Glucksberg, 117 S. Ct. 2258 (1997).

26 505 U.S. 833 (1992).

27 *Id.* at 851.

28 *See id.* at 845–46.

29 *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989).

30 *See, e.g.*, Reno v. Flores, 507 U.S. 292 (1993); Collins v. Harker Heights, 503 U.S. 115 (1992).

31 117 S. Ct. 2258 (1997).

Constitution provides no protection for unenumerated rights.[32] "The Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint. The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests."[33] The Court then proceeded to describe what it called "[o]ur established method of substantive-due-process analysis,"[34] which squarely rejects the moral philosophic approach. This analysis has three important elements that distinguish it from the alternatives.

First, under the Court's analysis, a person challenging a law on substantive due process grounds must satisfy a "threshold requirement" of demonstrating that the "challenged state action implicates a fundamental right."[35] Only then may the court require "more than a reasonable relation to a legitimate state interest to justify the action."[36] This differentiates the Court's approach from one in which the reviewing court balances the state interest against the importance of the individual liberty claim in every case. By imposing this "threshold requirement," the Court "avoids the need for complex balancing of competing interests in every case."[37] It is unnecessary to examine the governmental justification (beyond mere reasonableness) unless the claimant has established that the asserted right is fundamental.

Second, and most significantly, this threshold requirement may be satisfied only by showing either that the asserted right is textually based (like the right to freedom of speech), or that it is "objectively, deeply rooted in this Nation's history and tradition." The Court explained that "[o]ur Nation's history, legal traditions, and practices . . . provide the crucial 'guideposts for responsible decisionmaking.'"[38] This is an historical rather than a philosophical inquiry. It depends not on what judges believe the scope of liberty *should be*, but on what

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32 *See id.* at 2267.

33 *Id.* (citations omitted).

34 *Id.* at 2268.

35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.* (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977), and *Collins*, 503 U.S. at 125). The Court went on to add the phrase "and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). If this is intended to be an additional necessary element of the threshold requirement, it is doubtful that many, if any, claims would survive. In the Court's actual analysis of assisted suicide, the Court made no further reference to this standard. I infer that the "tradition" standard is sufficient to stand alone.

the American people have treated as protected liberty through our history, either through adoption of constitutional text or through longstanding practice. The opinion for the Court illustrated the nature of this inquiry by a detailed examination of the common law and statutory law pertaining to assisted suicide in the United States.[39] Significantly, the Court extended this historical inquiry all the way to the present, examining recent history to satisfy itself that the traditional condemnation of assisted suicide continues to reflect the mores of the nation.[40] Thus, it is not necessary to show that a challenged practice was protected at the time of adoption of the Fourteenth Amendment,[41] but only that it has enjoyed protection over the course of years. Although the Court did not explicitly say so, the opinion implied that even a traditional norm could come to violate substantive due process if it is subsequently abandoned or rejected by a new stable consensus.[42]

Third, the Court insisted that this historical inquiry must be based on "a 'careful description' of the asserted fundamental liberty interest."[43] This means that the "liberty interest"[44] must be described with specificity. Airy generalities like "the right to be left alone,"[45] or to make choices "central to personal dignity and autonomy,"[46] which mean almost anything or almost nothing, are too imprecise to support legal analysis. Because there are so many conceptions of what these abstractions mean, it would be impossible to determine whether any such traditions exist, or if they exist, what might be included within them.[47]

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39 *See id.* at 2262–66, 2271.

40 *See id.* at 2265–67.

41 The Joint Opinion in *Casey* suggests that Justices O'Connor and Kennedy (mis)understood Justice Scalia to be arguing that the content of fundamental rights for purposes of substantive due process was fixed as of the time "when the Fourteenth Amendment was ratified." *Casey*, 505 U.S. at 847 (citing *Michael H.*, 491 U.S. at 127–28 n.6 (Scalia, J., concurring)). Perhaps it is the clarification of this important point that enabled Justices O'Connor and Kennedy to join the opinion in *Glucksberg*, when they were not willing to join Justice Scalia's similar opinion in *Michael H.*

42 *Cf.* Burnham v. Superior Court, 495 U.S. 604, 615, 622 (1990) (holding, in procedural due process context, that tradition must be "continuing" as well as longstanding to be authoritative).

43 *Glucksberg*, 117 S. Ct. at 2268 (quoting *Reno*, 507 U.S. at 302).

44 I personally consider the term "liberty interest" an ugly and unnecessary piece of jargon. But since the Court uses the term, so must I.

45 *Bowers*, 478 U.S. at 189 (Blackmun, J., dissenting).

46 *Compassion in Dying*, 79 F.3d at 813 (quoting *Casey*, 505 U.S. at 851).

47 Significantly, this methodological point had been made in slightly different language by Justice Scalia in a plurality opinion several years before, but did not command majority support. *See Michael H.*, 491 U.S. at 121–24 (1989) (Scalia, J., concurring). Acceptance of this point is one of the most important aspects of the *Glucksberg* decision.

If the asserted right finds no support in constitutional text or in deeply rooted history and tradition, then it is not "fundamental," and the judicial inquiry comes to an end, save for the requirement, applicable to all laws, that the challenged restriction "be rationally related to legitimate government interests."[48] The effect is to allow the democratic, decentralized institutions of the country to continue to ponder the issue, and to adapt to changing mores and national experience. The Court's approach thus leaves social change and experimentation to the political branches, and reserves to the courts the task of enforcing traditional and enduring principles of justice. As the Chief Justice noted, such a resolution of the constitutional question "permits this debate to continue, as it should in a democratic society."[49]

The traditionalist approach adopted in *Glucksberg* differs sharply from the moral philosophic approach not just in its substance but in its intellectual style. The moral philosophic approach is deductive and theoretical, deriving specific prescriptions from more general theoretical propositions. For example, the Ninth Circuit's argument for recognizing a right to assisted suicide was based on the assertion that this right is encompassed within a supposed right of each individual "to make the 'most intimate and personal choices central to personal dignity and autonomy.'"[50] The traditionalist approach, by contrast, is inductive and experiential. Rather than reasoning down from abstract principles, it reasons up from concrete cases and circumstances. It can be seen as the conservative heir to legal realism: cautious, empirical, flexible, skeptical of claims of overarching theory.

Under the approach outlined in *Glucksberg*, it should not matter what the judge's own opinions regarding the "political morality" of the laws in question may be. In principle, judges of diametrically opposed opinions on the wisdom or justice of the challenged law should reach the same legal conclusion, since the decision will hinge on objective historical fact rather than on normative judgment. In some cases, of course, there will be legitimate differences of opinion regarding the historical record, which courts will have to resolve. But in many other cases, the historical analysis will produce a tolerably clear answer. In *Glucksberg* itself, for example, there was no serious argument that the legal traditions of the Nation support the asserted right. Rather, as the Court stated, "[t]he history of the law's treatment of assisted

48 *Glucksberg*, 117 S. Ct. at 2271.
49 *Id.* at 2275.
50 *Compassion in Dying*, 79 F.3d at 813–14.

suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it."[51] Accordingly, the Court held that there is no basis for the claim that assisted suicide is a fundamental right, and therefore no need for heightened judicial scrutiny.[52]

C. Was There a Clear Holding in Glucksberg?

The judgment in *Glucksberg* was unanimous, but the majority opinion commanded only five votes, and there were five separate concurring opinions. These concurring opinions and the different and inconsistent statements of the issue that they contain have generated an unusual degree of confusion about the actual holding in the case. Professor Ronald Dworkin, for example, who joined an *amicus curiae* brief urging the Court to recognize a right to assisted suicide, has written that, if we examine "what the Court really said," it turns out that Chief Justice Rehnquist's position represented only a minority of the Court both as to methodology and as to result.[53] According to Dworkin, only three members of the Court agree with Rehnquist's methodology and five members of the Court "took care not to foreclose the constitutional debate over [the right to assisted suicide] for the future."[54] A close look at the various opinions is therefore necessary to assess the authority and precedential significance of the *Glucksberg* decision.

In my judgment, the methodological holding of the Court plainly commanded a solid five votes. Whatever their doubts in earlier cases, Justices O'Connor and Kennedy have joined the Chief Justice and Justices Scalia and Thomas in a rigorous, tradition-based methodology for recognition of unenumerated rights under the Due Process Clause. Three of the Justices—Souter, Stevens, and Breyer—articulated methodologies at variance with the Court's, but none of those alternatives attracted the support of any Justice other than the author. On the merits, eight members of the Court rejected the claimed right to assisted suicide on the part of competent, terminally ill patients for the foreseeable future, though one (Souter) laid out the conditions for possible recognition of such a right after the states have gained experience with the issue, and three members of the Court (O'Connor, Breyer, and Ginsburg) reserved the possibility

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51 *Glucksberg*, 117 S. Ct. at 2271.

52 *See id.*

53 Ronald Dworkin, *Assisted Suicide: What the Court Really Said*, 44 N.Y. REV. BOOKS, Sept. 25, 1997, at 40, 42.

54 *Id.*

that a state law prohibiting a terminally ill patient from receiving adequate pain relief, if such a law existed, might be unconstitutional.[55] Only Justice Stevens, whose "concurrence" should have been styled a dissent, would accept the basic holding of the Ninth Circuit recognizing a right to die if it were properly presented.[56]

Understanding these opinions requires careful attention to the way each of the Justices framed the legal issue. Under Washington law, any person who "'causes or aids another person to attempt suicide'" is guilty of a felony.[57] The plaintiffs were three competent, terminally ill patients who wished to hasten their deaths with the help of their physicians and four doctors who wished to provide such assistance.[58] As described by the Ninth Circuit, these plaintiffs challenged the portion of the Washington statute covering "aid[ing] another person to commit suicide," *both* on its face *and* as applied to "terminally ill, mentally competent adults who wish to hasten their own deaths with the help of medication prescribed by their doctors."[59] The district court (Chief Judge Barbara Rothstein) granted the plaintiffs' motion for summary judgment, holding that the Washington statute violated their constitutional right "to commit physician-assisted suicide,"[60] but did not differentiate between the facial and the as applied challenge.

The three patient-plaintiffs died before the case could be decided on appeal. The Ninth Circuit, sitting en banc,[61] held that the doctor plaintiffs had standing to continue the suit,[62] and thus that the case was not moot. The Ninth Circuit then affirmed on the merits. Attempting to cure any uncertainty regarding the district court's ruling, the court "clarif[ied] the scope of the relief," stating: "We hold that the 'or aids' provision of Washington statute RCW 9A.36.060, *as applied to the prescription of life-ending medication for use by terminally ill, competent adult patients who wish to hasten their*

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55 *See Glucksberg*, 117 S. Ct. at 2303 (O'Connor, J., concurring), 2310 (Ginsburg, J., concurring in the judgments), 2312 (Breyer, J., concurring in the judgments).

56 *See id.* at 2308 (Stevens, J., concurring in the judgments).

57 *Id.* at 2261 (quoting WASH. REV. CODE § 9A.36.060(1) (1994)).

58 *See id.* at 2261 n.4.

59 *Compassion in Dying*, 79 F.3d 790, 794, 797. For an explanation of the distinction between facial and as applied challenges, see generally Michael C. Dorf, *Facial Challenges to State and Federal Statutes,* 46 STAN. L. REV. 235 (1994).

60 Compassion in Dying v. Washington, 850 F. Supp. 1454, 1462 (W.D. Wash. 1994).

61 An earlier panel of the Ninth Circuit had reversed the district court, in an exceptionally thoughtful opinion by Judge John Noonan. *See* Compassion in Dying v. Washington, 49 F.3d 586 (9th Cir. 1995).

62 *See Compassion in Dying,* 79 F.3d at 795–96. *Cf.* Roe v. Wade, 410 U.S. 113, 125 (1973) (holding that doctor had standing to challenge anti-abortion laws).

deaths, violates the Due Process Clause of the Fourteenth Amendment."[63] The court expressly declined to address the *facial* constitutionality of the Washington law.[64]

The Supreme Court contributed to the uncertainty by formulating the question presented in different terms in various sections of its opinion.[65] At the outset, the majority stated that the question before the Court was whether "Washington's physician-assisted suicide statute is unconstitutional as applied to the 'class of terminally ill, mentally competent patients.'"[66] Later in the opinion, however, the Court restated the question as "whether the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so."[67] With all respect, this second formulation of the question presented was not an accurate depiction either of the holding of the lower court or of the claim asserted by the plaintiff-respondents. These had been carefully limited to competent, terminally ill patients. No one in the litigation asserted that the Washington statute was unconstitutional as applied, for example, to healthy persons in the prime of life. The inaccuracy of the Court's restatement of the question proved harmless, however, because in the next paragraph the Court concluded that there exists "a consistent and almost universal tradition that has long rejected the asserted right . . . even for terminally ill, mentally competent adults."[68] Thus, the Court squarely rejected *both* the overbroad statement of the asserted right *and* the more focused assertion of a right to assistance in suicide on the part of competent, terminally ill persons. (Note that neither the Supreme Court majority, nor the Ninth Circuit, nor the plaintiff-respondents explicitly included any reference to physical pain in their description of the "as applied" class, a point which becomes central to the O'Connor, Breyer, and Ginsburg concurrences.) The Court concluded with the statement:

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63 *Compassion in Dying,* 79 F.3d at 798 (emphasis added).

64 *See id.* at 798 n.9.

65 Respondents' question presented was ambiguous as to its facial or as applied character. *See* Brief for Respondents at i, Washington v. Glucksberg, 117 S. Ct. 2258 (1997) (No. 96-110) ("Whether the Fourteenth Amendment's guarantee of liberty protects the decision of a mentally competent, terminally ill adult to bring about impending death in a certain, humane, and dignified manner?").

66 *Glucksberg,* 117 S. Ct. at 2262 n.6 (quoting *id.* at 2309 (Stevens, J., concurring in the judgments) (explaining holding of Ninth Circuit en banc decision below)).

67 *Id.* at 2269.

68 *Id.* Under the Court's approach, it is necessary to state the asserted constitutional right as carefully and specifically as possible. *See id.* Where, as here, there is no support in our national experience for the asserted right stated either in general terms (assisted suicide) or in specific terms (assisted suicide by competent, terminally ill patients), the difference is inconsequential.

"We therefore hold that Wash. Rev. Code § 9A.36.060(1) (1994) does not violate the Fourteenth Amendment, either on its face or 'as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors.'"[69] This holding sets the stage for an analysis of the concurring opinions.

Although the meaning of the concurring opinions is not entirely free from doubt, it is apparent that only Justice Stevens ultimately disagrees with the Court about the constitutionality of laws prohibiting assisted suicide. Indeed, it is a mystery why Justice Stevens styled his separate opinion as "concurring in the judgments" rather than as a dissent. Justice Stevens based this description on what appears to be a patent misstatement of the holding of the majority: "Today, the Court decides that Washington's statute prohibiting assisted suicide is not invalid 'on its face,' that is to say, in all or most cases in which it might be applied. That holding, however, does not foreclose the possibility that some applications of the statute might well be invalid."[70]

This inexplicably disregards the Court's explicit rejection of the "as applied" challenge on behalf of competent, terminally ill patients. What could be the explanation? It is apparently based on mootness.

Justice Stevens explained that because the three patient-plaintiffs who had brought the case in district court had died before the Court of Appeals had rendered its decision, "the court did not have before it any individual plaintiff seeking to hasten her death or any doctor who was threatened with prosecution for assisting the suicide of a particular patient."[71] According to Justice Stevens, this meant that the case was entirely a facial challenge to the Washington statute. He had no difficulty in agreeing with the majority that the Washington statute is not unconstitutional in every conceivable application.[72] However, he would not "foreclose the possibility" that the statute may be unconstitutional as applied to some "terminally ill,

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69 *Id.* at 2275 (quoting *Compassion in Dying*, 79 F.3d at 838). Chief Justice Rehnquist dropped a footnote at the end of the opinion stating the obvious: that the decision does not "absolutely foreclose" the possibility of an as applied claim "'in a more particularlized challenge.'" *Id.* at 2273 n.24 (quoting *id.* at 2309 (Stevens, J., concurring in the judgments)). But the Court noted that "such a claim would have to be quite different from the ones advanced by respondents here." *Id.* This indicates that to warrant serious consideration, any variation on the claim would have to be based on something other than the competence and terminal illness of the person claiming the right.

70 *Glucksberg*, 117 S. Ct. at 2304 (Stevens, J., concurring in the judgments) (footnote omitted).

71 *Id.*

72 *See id.* at 2305. This would include "an ill-advised decision motivated by temporary concerns." *Id.*

mentally competent patients."[73]

Justice Stevens' apparent conclusion that the as applied challenge was moot does not withstand analysis. As the Ninth Circuit noted, the proposition that physicians have standing to assert the legal rights of their patients has been established in many cases,[74] and it is difficult to believe that Justice Stevens intended to question it. Accordingly, the presence of the physician-plaintiffs in the lawsuit precluded any holding that it was moot. Moreover, if Justice Stevens doubted the standing of the physicians to continue the lawsuit, he should have concluded that the *entire case* was moot; there was no more basis for holding that the physicians had standing to raise a facial than an as applied challenge. If the physician-plaintiffs had standing to raise the as applied claim, however, Justice Stevens could not concur in the judgment without contradicting his own position that at least some competent, terminally ill patients do have a constitutional right to assisted suicide. His position is therefore incoherent unless understood as a dissent.

The other separate opinions, by contrast, are genuine concurrences. Despite the optimistic face that some pro-assisted suicide commentators have put upon them, they offer virtually no support for the constitutional protection of a right of physician-assisted suicide.

Apart from Justice Stevens, Justice Souter showed the greatest sympathy for the constitutional claim. Departing in subtle but important ways from the majority's constitutional methodology,[75] Souter was not prepared to reject the possibility that the interest asserted in *Glucksberg* "might in some circumstances, or at some time, be seen as 'fundamental.'"[76] It was not necessary to resolve that threshold issue, however, because Justice Souter was "satisfied" that the state's interests in prohibiting assisted suicide "are sufficiently serious to defeat the present claim that its law is arbitrary or purposeless."[77] Justice Souter was persuaded that the legal prohibition of assisted suicide is necessary to protect patients from death based on medical mistake (inadequate palliative care, failure

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73 *Id.* at 2309.

74 *See, e.g.*, Singleton v. Wulff, 428 U.S. 106, 116–17 (1976); Doe v. Bolton, 410 U.S. 179, 188 (1973). Petitioners in *Glucksberg* did not challenge the standing of the physician-plaintiffs, and none of the Justices (other than Stevens) apparently even considered it an issue.

75 *See supra* Part I.B.

76 *See Glucksberg*, 117 S. Ct. at 2290 (Souter, J., concurring in the judgment).

77 *Id.* One of the oddities of Justice Souter's opinion is that he uses the terms "arbitrary" and "purposeless," which in ordinary constitutional parlance are synonymous with rational basis scrutiny, as if they referred to some form of heightened scrutiny.

to treat for clinical depression, or erroneous prognosis of a terminal condition), and to prevent voluntary active euthanasia.[78] He noted that regulations have been proposed to mitigate these concerns, but concluded that the effectiveness of regulatory safeguards is a matter for legislative, not judicial, decision.[79] In the face of uncertainty about the effectiveness of safeguards, legislatures have "more flexible mechanisms for factfinding," including "the power to experiment, moving forward and pulling back as facts emerge within their own jurisdictions."[80] Accordingly, while he would not "decide for all time that respondents' claim should not be recognized," Justice Souter "acknowledge[d] the legislative institutional competence as the better one to deal with that claim at this time."[81] While Justice Souter did not specify when, if ever, he might be prepared to override legislative determinations, he suggested that this would not occur until "we can say with some assurance which side is right."[82] He explained that "[a]n unenumerated right should not . . . be recognized, with the effect of displacing the legislative ordering of things, without the assurance that its recognition would prove as durable as the recognition of [constitutional rights . . . derived from some more definite textual source than 'due process']."[83] It is unlikely, on an issue of this sort, that reasonable disagreement will be eliminated, or consensus reached, in the foreseeable future.[84]

This leaves Justices O'Connor, Breyer, and Ginsburg. Did any of them disagree with the majority on the constitutional right of competent, terminally ill persons to commit assisted suicide?

Justice O'Connor joined Chief Justice Rehnquist's opinion for the majority in its entirety, and therefore must be assumed to concur both in its holding as to the facial validity of the Washington law and as to its constitutional application to competent, terminally ill persons. Nonetheless, she filed a separate concurring opinion, explaining why she did not consider it necessary to address a

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78 *See id.* at 2290–91.

79 *See id.* at 2291–93.

80 *Id.* at 2293.

81 *Id.*

82 *Id.* at 2292.

83 *Id.* at 2293.

84 Professor Dworkin's suggestion that Justice Souter will be willing to override legislative judgments "when and if better evidence is available or more persuasive studies have been made," Dworkin, *supra* note 53, at 42, trivializes Justice Souter's principled position that legislatures, not courts, must resolve most questions that hinge on reasonable disagreement about facts. Souter's point was not just that there are not enough "persuasive studies" on which a court could base a conclusion, but that legislatures have greater competence and legitimacy in such matters.

"narrower question" not addressed by the majority, namely: "whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death."[85] The difference between this formulation and the question addressed by the majority is that it focuses on patients who are "experiencing great suffering." More precisely, Justice O'Connor was concerned with the question "whether suffering patients have a constitutionally cognizable interest in obtaining relief from the suffering that they may experience in the last days of their lives."[86] She explained that there was no need to address the question, however, because under the challenged state laws, "a patient who is suffering from a terminal illness and who is experiencing great pain has no legal barriers to obtaining medication, from qualified physicians, to alleviate that suffering, even to the point of causing unconsciousness and hastening death."[87] It is thus apparent that Justice O'Connor was not disagreeing with the majority over its rejection of the putative right of competent, terminally ill patients to commit assisted suicide, but was signaling her belief that it might be unconstitutional for a state to erect "legal barriers" that would restrict the ability of such a patient to obtain adequate pain relief.

This interpretation is confirmed by Justice Breyer's concurrence, which praised and joined Justice O'Connor's separate opinion.[88] After suggesting that a better way to formulate the asserted constitutional right would be to "use words roughly like a 'right to die with dignity,'" Justice Breyer stated that it was not necessary to decide whether such a right would be "fundamental" because an "essential part" of any such claim would be "the avoidance of severe physical pain," and "as Justice O'Connor points out, the laws before us do not *force* a dying person to undergo that kind of pain."[89] Justice Breyer explained:

> Were the legal circumstances different—for example, were state law to prevent the provision of palliative care, including the administration of drugs as needed to avoid pain at the end of life—then the law's impact upon serious and otherwise unavoidable

85 *Glucksberg*, 117 S. Ct. at 2303 (O'Connor, J., concurring).
86 *Id.*
87 *Id.*
88 *See id.* at 2310 (Breyer, J., concurring in the judgments).
89 *Id.* at 2311.

> physical pain (accompanying death) would be more directly at issue.[90]

Justice Ginsburg joined Justice O'Connor's opinion without further comment, except insofar as it joined the majority opinion.[91] Thus, three Justices (O'Connor, Breyer, and Ginsburg) might find constitutional problems with a statute that foreclosed the patient's ability to obtain relief from pain, but so long as the law does not interfere with the administration of pain relief, these Justices were in agreement with the majority in rejecting a right to assisted suicide.

On the merits of assisted suicide, then, there was no substantial disagreement (and perhaps no disagreement at all) between any of the Justices other than Justice Stevens. On the question of methodology, however, Justices Stevens, Breyer, and Souter expressed disagreement with the majority.[92] Justice Ginsburg presumably should be counted as among those with methodological disagreements, since she refused to join the majority opinion—though her refusal to join any of the concurrences that set forth a divergent view makes her precise position difficult to discern. I therefore score the decision as 8–1 on the merits, and 5–4 on the constitutional methodology. It is significant, moreover, that Justices Souter and Breyer both took pains to emphasize that they were not advocating a return to anything like the pure moral philosophic approach to substantive due process. Both took their bearings from the second Justice Harlan, the most conservative member of the Warren Court. Both advocated an approach to substantive due process in which courts have the latitude to recognize fundamental interests that are "related, but not identical" (in Justice Breyer's words) to previously recognized constitutional rights.[93] This is a more expansive approach than the majority's, but is more cautious and restrained than the moral philosophic alternative. Among the nine members of the Court, *Roe*-style judicial imperialism found only one stalwart defender,

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90 *Id.* at 2312.

91 *See id.* at 2310 (Ginsburg, J., concurring in the judgments).

92 Professor Dworkin's claim that Justice O'Connor's opinion "makes it plain that she still does not accept Rehnquist's historicist understanding of the due process clause," Dworkin, *supra* note 53, at 40, is without foundation. Not a word of Justice O'Connor's opinion was addressed to methodological issues. She joined the Rehnquist opinion, which certainly suggests that she agrees with it. Dworkin's notion that Justices O'Connor and Kennedy joined the majority opinion "out of institutional courtesy," *id.*, rather than because they agreed with it, is evidently a product of wishful thinking.

93 *Id.* at 2311 (Breyer, J., concurring in the judgments). He uses the phrase "related, but not identical" twice. *See id. Cf. id.* at 2281–85 (Souter, J., concurring in the judgments) (describing his approach).

Justice John Paul Stevens.[94]

II. A THEORETICAL, INSTITUTIONAL, AND TEXTUAL-HISTORICAL JUSTIFICATION OF THE *Glucksberg* APPROACH TO SUBSTANTIVE DUE PROCESS

I believe the Court's traditionalist approach to adjudication of unenumerated rights claims announced in *Glucksberg* is wise, workable, and firmly grounded in principles of American constitutionalism. It provides a check against particular states or local jurisdictions whose practices contradict what most Americans would deem to be fundamental rights, but does so without licensing courts to second-guess democratic judgments on the basis of their own ideological or philosophical preferences. It must be admitted, however, that Chief Justice Rehnquist's opinion for the Court does not supply much in the way of reasons to support its position. Most strikingly, the opinion makes no reference to the historical purposes or understanding of the Fourteenth Amendment, which provides the supposed textual basis for judicial action of this sort. The opinion is almost ostentatiously non-theoretical. To be sure, the Court wisely observed that when it extends constitutional protection to an asserted right, it "place[s] the matter outside the arena of public debate and legislative action" and that promiscuous use of the power will "subtly transform[ ]" the Due Process Clause "into the policy preferences of the members of this Court."[95] But the opinion did not explain why the former consequence is contrary to our structure of government or why the latter is inconsistent with the theory of a written constitution. Nor did it explain why its own approach—reliance on history and tradition—solves the problem. Perhaps the Court thought these things are obvious.

For those who find the Court's reasoning less than obvious, let me provide an explanation. In the sections that follow, I will explain first, the theoretical foundation of the Court's approach; second, why the Court's approach follows from a proper understanding of the judicial role in our constitutional system; and third, the connection between the Court's approach and a proper theory of interpretation of the Fourteenth Amendment and its history.

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94 *See id.* at 2304 (Stevens, J., concurring in the judgments).

95 Washington v. Glucksberg, 117 S. Ct. 2258, 2268 (1997), *rev'g* Compassion in Dying v. Washington, 79 F.3d 790 (9th Cir. 1996) (en banc).

A. Democracy and Conventionalism

It is a postulate of our political system that legitimate government has its origins in the consent of the governed. To be legitimate, therefore, constitutional rulings must trace their authority, in some sense, to decisions of the people. Even if there were reason to suppose that decisions of the nine Supreme Court Justices would likely be wiser and more just than decisions of the people (which there is not), this would not be a sufficient ground for allowing the Justices to base decisions on their own moral and political opinions, since such a government would no longer be a government of the people.

That is why Chief Justice Rehnquist's insistence that constitutional rulings be based either on constitutional text or on longstanding national consensus makes sense. These are two alternative ways of discerning the will of the people. Constitutional text was formally adopted by a supermajority of the people, and deserves respect for that reason. Longstanding consensus similarly reflects a supermajority of the people, expressed through decentralized institutions. No single vote, no single electoral victory, no single jurisdiction suffices to establish a tradition: it requires the acquiescence of many different decision makers over a considerable period of time, subject to popular approval or disapproval. When judges base their decisions either on constitutional text or on longstanding consensus, they do not usurp the right of the people to self-government, but hold the representatives of the people accountable to the deepest and most fundamental commitments of the people.

Moreover, reliance on longstanding consensus is likely to be a more reliable means of reaching a correct result. The problem with decisions based on moral philosophy—like all versions of natural law adjudication—is the uncertain application of theoretical principles to concrete issues. There are limits to the capacity of human reason to reach a definitive answer to many questions of political morality. Unless expressed at a high level of generality, principles of natural law appear arbitrary and contestable rather than natural; but so expressed, the principles are virtually useless for deciding actual matters of controversy.

We might be able to agree on highly generalized principles like "human dignity," "fair play," or "equal concern and respect," but how those abstractions will apply to such specific questions as affirmative action, capital punishment, or proper modes of service of process (to name a few examples) is a matter of disagreement among reasonable

people. The attraction of natural law is its seemingly universal reasonableness; but specific applications to specific issues lose that quality of universality. When a court announces that the abstract principle of "equal concern and respect" mandates (or precludes) affirmative action, or the principle of personal autonomy mandates (or precludes) assisted suicide, the judge is not in any realistic sense "applying" natural law, but is merely applying his own opinion about affirmative action or assisted suicide. There is no reason the judge's opinion should prevail over that of the people.

In the absence of any reliable basis for resolving moral and philosophical disagreements of this sort (other than whether a position accords with our own opinion!), courts should look to experience and to stable consensus as an objective basis for decision making. If a practice is adopted by many different communities, and maintained for a considerable period of time, this provides strong evidence that the practice contributes to the common good and accords with the spirit and mores of the people. To be sure, there can be bad, evil, or counterproductive traditions; but if so, one would expect to see a movement away from them. At least, there is more reason to have faith in the product of decentralized decisions, based on experiments and experience over a period of many years, than in the abstract theorizing of particular individuals, even oneself. Imposition of a new, untried, principle will almost certainly have unintended and unpredictable consequences, which is why prudent statesmen are guided by experience rather than by idealistic speculation.[96]

This (and not the superior reasoning power of judges) was the original basis on which the common law commanded authority. As explained by the great common lawyer Sir John Davies:

> [A] Custome taketh beginning and groweth to perfection in this manner: When a reasonable act once done is found to be good and beneficiall to the people, and agreeable to their nature and dispositon, then do they use it and practise it again and again, and so by often iteration and multiplication of the act it becometh a *Custome*; and being continued without interruption time out of mind, it obtaineth the force of a *Law*.
>
> And this *Customary Law* is the most perfect and most excellent, and without comparison the best, to make and

96 This point is associated with the political philosophy of Edmund Burke. *See, e.g.*, EDMUND BURKE, SPEECH ON THE PETITION OF THE UNITARIAN SOCIETY, *reprinted in* EDMUND BURKE: SELECTED WRITINGS AND SPEECHES 313 (Peter J. Stanlis ed., 1963); EDMUND BURKE, SPEECH ON THE REPRESENTATION OF COMMONS IN PARLIAMENT, *reprinted in id.* at 328-36.

> preserve a Commonwealth. For the *written Laws* which are made either by the Edicts of Princes, or by Councils of Estates, are imposed upon the Subject before any Triall or Probation made, whether the same be fit and agreeable to the nature and disposition of the people, or whether they will breed any inconvenience or no. But a *Custome* doth never become a Law to bind the people, untill it hath been tried and approved time out of mind, during all which time there did thereby arise no inconvenience: for if it had been found inconvenient at any time, it had been used no longer, but had been interrupted, and consequently it had lost the virtue and force of a Law.[97]

The voice of tradition is thus the voice of humility: the assumption that when many people, over a period of many years, have come to a particular conclusion, this is more reliable than the attempt of any one person (even oneself) or small group of persons (such as the Court) to chart a new course on the basis of abstract first principles.

The moral philosophic approach, by contrast, necessarily presupposes that judges are wiser, fairer, more reflective decision makers than those who are more immediately accountable to the public. Alas, there is no evidence to support that presupposition. Indeed, a decentralized process in which many different people, of differing perspectives and walks of life, can participate—directly or indirectly—in the decision making process, is more likely to produce a balanced and sensible conclusion. Federal judges are, almost without exception, well meaning and well educated people. But the courts are a narrow institution, no less prone to prejudice (of a particular sort) than anyone else. Judge Stephen Reinhardt's opinion for the Ninth Circuit dismissed views on assisted suicide contrary to his own as "cruel," "untenable," "disingenuous and fallacious," "meretricious," "ludicrous," and "nihilist."[98] The court praised its own view as "more enlightened."[99] The court characterized hundreds of years of common law precedent as "taboos," linked to superstition;[100] it brushed aside the central text of medical ethics, the Hippocratic Oath, saying that it "does not represent the best or final word on medical or legal controversies today."[101] The Ninth Circuit criticized

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97 J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW 33 (1987) (quoting Sir John Davies, dedication of his IRISH REPORTS (1612) to Lord Chancellor Ellesmere).

98 Compassion in Dying v. Washington, 79 F.3d 790, 821–25 (9th Cir. 1996) (en banc), *rev'd sub nom.* Washington v. Glucksberg, 117 S. Ct. 2258 (1997).

99 *Id.*

100 *Id.* at 820.

101 *Id.*

the conclusions of the American Medical Association and the American Geriatrics Society (among others) as reflecting "a misunderstanding of the proper function of a physician."[102] The sublime arrogance of these judicial pronouncements highlights the danger of allowing courts to set social policy, in defiance of legislatures and referenda, on the basis of their own (often ill-informed) philosophical intuitions.

By relying on the experience and settled judgment of the nation, rather than their own opinions, judges thus keep faith with the democratic postulates of our system, and at the same time are more likely to reach answers that will stand the test of time.

B. The Institutional Dimension

The question of assisted suicide provides an excellent context for consideration of the institutional dimensions of judicial review of novel claims of constitutional right, precisely because of the unambiguous character of the historical record. The case for a right to assisted suicide rested entirely on philosophical, not historical, premises and the case thus highlighted the pitfalls of constitutional decision making based on such premises. Under the moral philosophic approach, courts are instructed to determine for themselves what is the best answer to the problem posed. Indeed, in *Glucksberg*, the Court had the benefit of an unusual amicus curiae brief, signed by six of America's leading political philosophers, which argued that the Court *should* recognize the right of terminally ill patients to the assistance of doctors in shortening their lives.[103]

But there is every reason for courts to be wary about overturning duly enacted legislation on the basis of untried and uncertain moral and philosophical arguments, where the result is bereft of support in directly relevant constitutional text or in national experience. It may well be true that attitudes about the end of life have changed, or will change, in response to technological developments and their attendant economic and emotional consequences. But no one knows what the actual consequences of various possible policies would be. It would be a grave mistake for the federal courts to leap in and attempt, prematurely, to resolve the issue or to accelerate the pace of change. Even on the heuristic assumption that laws against assisted suicide and euthanasia should be relaxed in some fashion, it is better that

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102 *Id.* at 828.

103 *See* Ronald Dworkin et al., *Assisted Suicide: The Philosophers' Brief*, 44 N.Y. REV. BOOKS, Mar. 27, 1997, at 41, 41–47.

reform take place in decentralized and accountable institutions.

A jurisprudence grounded in text and tradition is not hostile to social change, but it assigns the responsibility to determine the pace and direction of change to representative bodies. As Justice Scalia has argued, the argument over traditionalist jurisprudence

> has nothing to do with whether "further progress is to be made" in the "evolution of our legal system." It has to do with whether changes are to be adopted as progressive by the American people or decreed as progressive by the Justices of this Court. Nothing we say today prevents individual States from limiting or entirely abandoning the [traditional position]. And nothing prevents an overwhelming majority of them from doing so, with the consequence that the "traditional notions of fairness" that this Court applies may change.[104]

The great institutional strength of courts is their ability to provide uniform enforcement of legal principles, with consistency across parties, regions, and time periods, treating like cases alike. Where operative principles are in flux and the consequences of new approaches are unpredictable, however, that virtue becomes a vice. Constitutional judicial review is too inflexible a process to deal sensitively and appropriately with the question of assisted suicide.

First, by locating the right to die in the federal constitution, judicial recognition of such a right would nationalize the issue and eliminate the possibility of state variation and experimentation. Justice Brandeis's characterization of the states as "laboratories of democracy"[105] is no cliché; it is an apt description of one of the principal virtues of a federal system.[106] There was no serious argument in *Glucksberg* that national uniformity is necessary or even desirable. The state of Oregon has undertaken an experiment in physician-assisted suicide[107] that—however misguided it may appear to many of us—will cast light on the practical consequences: on the efficacy of the safeguards against abuse, on the ability of the medical profession to recognize and treat clinical depression and pain in patients requesting suicide, on the robustness of the lines drawn between permitted and forbidden forms of the right to die, and on the danger that death will come to be perceived as a duty owed to family

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104 Burnham v. Superior Court, 495 U.S. 604, 627 (1990) (Scalia, J., opinion joined by Rehnquist, C.J., and Kennedy, J.) (citations omitted).

105 New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

106 *See generally* Michael W. McConnell, *Federalism: Evaluating the Founders' Design,* 54 U. CHI. L. REV. 1484, 1493-1500 (1987).

107 OR. REV. STAT. §§ 127.800 to 127.897 (Supp. 1996).

and society. To treat this social policy question as controlled by federal constitutional law is to eliminate the possibility of a multiplicity of approaches, and of regional variation in light of differences in social and moral perceptions.

Even a leading advocate of physician-assisted suicide, and sometime co-author with one of the doctors who was a party challenging the laws, has recognized that the right to die should be the subject of legislative reform rather than judicial fiat:

> Legalization of physician assisted suicide should be understood not as a matter of recognizing rights but as a policy aimed at making available a compassionate option of last resort for competent, terminally ill patients. Since we do not know whether such a policy will produce more good than harm, it should be viewed as an experiment.
>
> Our federal system of government has often been touted as offering "a laboratory of the states," with which to experiment concerning social policy. In the case of a morally controversial issue, subject to competing arguments pro and con, it is better that policy experimentation occur piecemeal, by the various decisions of the legislatures or voters of the states, rather than wholesale, by means of the constitutional adjudication of the federal courts.[108]

Second, by their nature constitutional judicial decisions may not be "compromises with social and political pressures."[109] The lines drawn by courts, under the authority of the Constitution, must be defensible at the level of constitutional principle. Yet not every aspect of social life can be governed by crisp and principled rules. Sometimes, the best and most peaceful solution to contentious moral conflicts in society is not to award the brass ring to one side or the other, but to construct compromises that allow each contending force to believe that the system has been responsive to their deeply held convictions. Legislatures are good at that.

Whatever one may think of legislators as moral deliberators, few would dispute that they have the expertise and incentive to resolve social conflict in a way that minimizes political opposition and resistance. The legislative answer may not appear pure from a philosophical or analytical perspective, but it is likely to reduce social discord. And even if legislatures prove unable to forge a stable consensus, contending social forces are more likely to accept the

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108 Franklin G. Miller, *Legalizing Physician-Assisted Suicide by Judicial Decision: A Critical Appraisal*, 2 BIOLAW S:136, S:144 (Special Section 1996).

109 Planned Parenthood v. Casey, 505 U.S. 833, 865 (1992).

outcome of a process in which their voices were heard than an imposed solution in which their elected representatives were not entitled to a significant role. This is one of the lessons of the abortion decisions.

The right to die is such an issue. The public is seriously divided. Passions run high. The various lines that might be drawn—refusal of treatment versus suicide, assisted suicide versus active euthanasia, terminal illness versus chronic pain or disability, actual consent versus imputed consent, intolerable pain versus other conditions that harm the quality of life, one set of safeguards versus another, and so forth—are, each of them, arbitrary in their own way. Each of them attempts to allow the dying patient some greater degree of control over the circumstances of his death, while at the same time upholding society's obligation to honor life and protect the vulnerable. Each tries to reconcile two honorable impulses that are, in principle, irreconcilable: autonomy and protection. Legislatures, better than courts, can make the compromises necessary to accommodate these conflicting ideals.

Third, and most importantly, courts are seriously constrained in their ability to change their policy in response to experience and criticism. Each decision of the Court is said to be based on an interpretation of the Constitution, and it strains public credulity that the meaning of such an old document would change very rapidly, very often. The doctrine of stare decisis thus creates a heavy presumption in favor of existing doctrine.[110] Stability is a source of judicial strength and legitimacy. But with this strength comes a caution: just as the Court is properly reluctant to jettison a constitutional doctrine that it has embraced, the Court should be reluctant to embrace novel constitutional doctrines that may require modification in the future. As Justice Souter commented, "[a]n unenumerated right should not therefore be recognized, with the effect of displacing the legislative ordering of things, without the assurance that its recognition would prove as durable as the recognition of [textually based constitutional rights]."[111]

Finally, the asymmetrical nature of the risks of judicial error suggests that, in close cases, the courts should defer to legislative judgments. In any case in which a party claims that the decision of our politically responsive institutions is unconstitutional, there are two possible risks. One risk is that the Court will uphold a law that is unconstitutional, thus allowing the continued infringement of

110 *See id.* 854–70.

111 *Glucksberg*, 117 S. Ct. at 2293 (Souter, J., concurring in the judgments).

constitutional rights. Examples would be *Plessy v. Ferguson*,[112] which upheld Jim Crow legislation segregating private railways, or *Minersville School District v. Gobitis*,[113] which upheld a requirement that Jehovah's Witness schoolchildren be compelled to participate in the flag salute. The opposite risk is that the Court will strike down a law that is constitutional, thus frustrating representative government and, in many cases, infringing statutory rights and protections. Examples would be *Dred Scott v. Sandford*,[114] in which the Court held it was unconstitutional for Congress to bar slavery from the territories, and *Lochner v. New York*,[115] in which the Court invalidated maximum hour legislation.

While both types of error have serious consequences, the former can be corrected by political means; the latter cannot. When the Court upholds unjust governmental action, citizens can turn to political means for relief, and legislative branches are able to correct the injustice. The majority of states outlawed transportation segregation notwithstanding *Plessy*, and school boards were free to exempt schoolchildren from the flag salute even if this was not required by *Gobitis*. This provides the seeds for change. When the Court erroneously strikes down legislation, however, it disables the political branches from correcting the error. The only remedies are constitutional amendment, political action to force the Court to reverse its judgment, or (as in the case of *Dred Scott*) violence or civil war. For these reasons, the repeated admonitions by some of the greatest Justices in the Supreme Court's history in favor of a presumption of constitutionality carry great weight.[116] A wise court, recognizing its own fallibility, will stay its hand in close cases where powerful arguments exist on both sides.

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112 163 U.S. 537 (1896).

113 310 U.S. 586 (1940).

114 60 U.S. (19 How.) 393 (1857).

115 198 U.S. 45 (1905).

116 *See, e.g.*, Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 625 (1819) (Marshall, C.J.) ("On more than one occasion, this Court has expressed the cautious circumspection with which it approaches the consideration of [constitutional] questions; and has declared, that, in no doubtful case, would it pronounce a legislative act to be contrary to the constitution."); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 270 (1827) (Washington, J.) ("It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt."); Ashwander v. TVA, 297 U.S. 288, 354–56 (1936) (Brandeis, J., concurring) (stressing "the long established presumption in favor of the constitutionality of a statute"); United States v. Butler, 297 U.S. 1, 78–79 (1936) (Stone, J., dissenting) ("[W]hile unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint.").

Glucksberg is a perfect example. If the Court had affirmed the lower courts' creation of a right to assisted suicide, neither Congress nor the states would have been able to explore contrary policies. Any substantial burden on the exercise of the new "right" would presumably be held invalid. If that judgment proved to be misguided, great injury would have been done to thousands of vulnerable persons in every state in the Union, until the Court brought itself to acknowledge the mistake and reverse the decision. On the other hand, under the Court's actual judgment upholding assisted suicide laws, debate on the issue can proceed in the future. The fifty states will remain free to pass laws allowing assisted suicide or euthanasia in such circumstances and under such safeguards as they may deem advisable. If experiments with liberalized laws on this subject are successful, it is likely that still more states will follow suit. If they prove misguided, these states can reverse course, and the other states will profit by their example.

A jurisprudence based on tradition is responsive to these institutional issues. It leaves room for experimentation and variation among the states, until such time as a stable national consensus has emerged and persisted. Then it may be advisable to force remaining outlier states to conform to the national norm. It allows representative institutions and common law courts to work out broadly acceptable compromises instead of imposing a prematurely "principled" (and therefore rigid) answer to the question. And it allows for adaptation and change. Only when a particular answer has stood the test of time should it be constitutionalized through substantive due process.

One final observation about the institutional capacities of courts and legislatures bears mention. Since the *United States v. Carolene Products*[117] decision, prominent strains of constitutional theory have maintained that the judiciary should be most willing to intervene in cases where the adverse consequences of the challenged law are borne by discrete and insular minorities whose interests may not have received their just weight in legislative deliberations.[118] Whatever the merits of that view in the abstract,[119] it is inapplicable to the assisted suicide question. When the New York legislature decided to retain its laws against assisted suicide, or the people of Washington made a similar decision by referendum, they were not legislating for a

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117 304 U.S. 144 (1938).

118 *See generally* ELY, *supra* note 14, at 96.

119 For a skeptical view, see Einer Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991).

discrete and insular minority. They were legislating for themselves and for their loved ones, behind a veil of ignorance that denies all of us the knowledge of what our condition may be in the final days of our lives. There is no reason to distrust the conclusions that they reached. As Justice O'Connor observed:

> Every one of us at some point may be affected by our own or a family member's terminal illness. There is no reason to think the democratic process will not strike the proper balance between the interests of terminally ill, mentally competent individuals, who would seek to end their suffering and the State's interests in protecting those who might seek to end life mistakenly or under pressure.[120]

If anything, the biases of the political process run the other way—favoring fewer protections against euthanasia than may be in the best interests of those immediately affected by the law. Studies indicate that the frail elderly, who are most likely to feel the effects of the law in this area, are significantly less likely to favor legalizing assisted suicide than the young and healthy.[121] This is not surprising. From the vantage point of youth and health, the quality of life enjoyed by disabled, chronically ill, or dying people appears excruciatingly low. But persons experiencing those conditions, whose point of comparison is not youth and health but death, often cling to life with increased tenacity. Self-interest, both individual on the part of family members and collective on the part of health care providers, also plays its part in shaping opinion on this issue. Suicide is cheap and convenient. The logic of *Carolene Products*, in this context, is that courts should be more active in ensuring that the protections against unwanted death are adequate than in ensuring that the political process is sufficiently receptive to the right to die.

C. The Glucksberg *Approach as an Interpretation of the Text and History of the Fourteenth Amendment*

Constitutional judicial review had its birth in the recognition that a written constitution reflects the limits that the people of the United

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120 *Glucksberg*, 117 S. Ct. at 2303.

121 Harold G. Koenig, et al., *Attitudes of Elderly Patients and Their Families Toward Physician-Assisted Suicide*, 156 ARCHIVES OF INTERNAL MED. 2240, 2240 (1996) (reporting that only 34% of elderly outpatients favor legalizing physician-assisted suicide, as compared to 55.6% of their families, and noting that female, black, and economically disadvantaged patients were most likely to oppose it).

States have placed upon their government.[122] It was no part of the theory of judicial review that the courts are superior to the people in their judgments of what those limits should be. It is revealing that the examples employed by Chief Justice Marshall in his great exposition of the theory of judicial review consisted of explicit limitations unambiguously violated by the government.[123] In such cases, it was clear that judicial review served to enforce the will of the people rather than the will of the judiciary.

Nonetheless, in the 210 years since the Constitution was adopted, the Supreme Court has frequently struck down acts of the political branches that do not violate any express provision. The most common basis for so doing is the Due Process Clause of the Fourteenth Amendment. This presents a jurisprudential problem: the very language of the Due Process Clause, which forbids the denial of life, liberty, or property *without* due process of law, necessarily implies that states *may* deny life, liberty, and property if due process of law is provided—unless some other provision of the Constitution is implicated. The notion of "substantive due process," as many distinguished commentators have pointed out, is an oxymoron—like "green pastel redness," in the famous comment of John Hart Ely.[124]

From the perspective of text and history, the Privileges or Immunities Clause of the Fourteenth Amendment would appear to be a more plausible basis for the protection of substantive rights (whether incorporated from the Bill of Rights or based on other sources) than the Due Process Clause. This Clause provides that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[125] As discussed below, the language "privileges or immunities" was a legal term of art that also appears in the Comity Clause of Article IV,[126] and that had been interpreted as referring to the essential rights and freedoms recognized in the American constitutional tradition. If there is any textually and historically plausible authorization for the protection of unenumerated rights, it is to be found in this Clause—not the Due Process Clause.[127]

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122 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

123 *See id.* at 178.

124 ELY, *supra* note 14, at 18. For a thorough analysis of various readings of the Due Process Clause that might support a substantive interpretation, see John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493 (1997).

125 U.S. CONST. amend. XIV, § 1.

126 *See id.* amend. IV.

127 This conflicts with the rationale (though not necessarily the result) of the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71–80 (1873), which reduced the Privileges or Immunities Clause to the redundancy of protecting only those rights already protected

Why does this matter? Any constitutional jurisprudence of substantive rights, if conducted under the rubric of the Due Process Clause, must necessarily appear to be based on something other than constitutional text and the authentic purpose of the Fourteenth Amendment. Indeed, such a jurisprudence will appear to have been created by judges with no delegation of constitutional authority by the people. Not only does this give the very idea of judicial protection of rights not specified by the text an undeserved aura of illegitimacy, it also—and more importantly—deprives us of a textual or historical basis for distinguishing between responsible and irresponsible exercises of that judicial power. Once it is recognized that the Privileges or Immunities Clause authorizes protection for rights *understood in a particular way*, there is a solid basis for distinguishing between legitimate and illegitimate uses of that power.

Although the Due Process Clause is essentially about process and the Privileges or Immunities Clause is essentially about substantive rights, the underlying principles and methodologies for application are analogous and complementary. The task of interpretation is greatly eased by the fact that each Clause had its counterpart in the Bill of Rights[128] and in Article IV,[129] respectively, and each had been authoritatively interpreted at the time those provisions were used in the new Fourteenth Amendment. When the framers of the Fourteenth Amendment used familiar legal terminology, it may be inferred that the terms were intended to be interpreted in light of then-prevailing doctrine. When John Bingham, principal author of the Fourteenth Amendment, was asked what was meant by "due process of law," he responded: "I reply to the gentleman, the courts have settled that long ago, and the gentleman can go and read their decisions."[130]

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under the Constitution and arising as a matter of federal citizenship. The overwhelming weight of historical and scholarly opinion is that *Slaughter-House* was wrong in this regard. *See, e.g.*, Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1257–59 (1992); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 175–79 (1986); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1466–69 (1992); Walter E. Murphy, Slaughter-House, *Civil Rights, and the Limits on Constitutional Change*, 1987 AM. J. JURIS. 1, 1–8 (1987); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 156–65 (1988). A rare exception to this scholarly consensus is ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 36–39 (1990).

For an explanation of the reasons why *Slaughter-House* was inconsistent with the text and original meaning of the Fourteenth Amendment, see Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 998–1000 (1995).

128 U.S. CONST. amend. V.

129 *See id.* art. IV, § 2.

130 CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866).

The leading case interpreting the Privileges and Immunities Clause of Article IV in the years prior to the Civil War was *Corfield* v. *Coryell*,[131] written by Justice Bushrod Washington on circuit. The court defined the privileges and immunities of citizens as consisting of

> those privileges and immunities which are, in their nature fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.[132]

In other words, these "fundamental" rights[133] had two characteristics: (1) they were recognized by "all free governments," and (2) they had been enjoyed by citizens "of the several states" from the beginning of the Republic. These are *historical*, not moral or philosophical, judgments. *Corfield* was repeatedly cited by proponents of the Fourteenth Amendment to explain what rights the new Amendment would protect.[134]

The leading case interpreting the Fifth Amendment Due Process Clause prior to the Civil War was *Murray's Lessee v. Hoboken Land and Improvement Co.*[135] In that case, Justice Benjamin Curtis (later to be the leading dissenter in *Dred Scott*) offered the following methodology for determining what "due process" entails in any particular case:

> We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political constitution by having been acted on by them after the settlement of this country.[136]

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131 6 F. Cas. 546 (1823).

132 *Id.* at 551.

133 It should be noted that the term "fundamental" rights did not necessarily mean rights that are especially important. Rather, in England, America, and western Europe, "fundamentality" most often referred to the character of being long-standing or ancient. *See* POCOCK, *supra* note 97, at 30–36, 47–55; J.W. GOUGH, FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY 160 (1955).

134 *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1835–36 (1866) (Rep. Lawrence); *id.* at 474-75 (1866) (Sen. Trumbull); *id.* at 2765 (1866) (Sen. Howard).

135 59 U.S. (18 How.) 272 (1856).

136 *Id.* at 277.

In other words, the content of due process is determined (1) by constitutional language and (2) by "settled usages and modes of proceeding": in other words, by text and tradition (precisely the position espoused by the *Glucksberg* majority). In the first important due process case after ratification of the Fourteenth Amendment, *Hurtado v. California*,[137] the Court reiterated this interpretation.

These two clauses of the Fourteenth Amendment thus have two common features. First, they take their bearings from the long-established rights and procedures of the American states. They are, accordingly, preservative rather than transformative. They are guarantees against unwarranted and unwise innovation; they are not invitations to judicially-mandated social change. This does not mean that the rights protected by these clauses are frozen in time. They may change as society changes. But before a claim may be accepted as a Fourteenth Amendment right, and imposed on the people of all the states, it must have attained widespread support, and been confirmed by experience. The Fourteenth Amendment is not a license for judicial social experimentation.

Second, the two clauses have the effect (as intended by the framers of the Fourteenth Amendment) of nationalizing the question of rights. Prior to the Fourteenth Amendment, the states were the principal locus of rights protection. Accordingly, the privileges and immunities of Americans were described in Article IV as "Privileges and Immunities of Citizens in the several States."[138] In the Fourteenth Amendment, these rights became known as "privileges or immunities of citizens *of the United States*."[139] They had become *national* in character. Moreover, under the new Amendment the power of the United States was deployed to prevent any state from abridging these rights, even as to its own citizens. As Bingham explained, the Amendment "protect[s] by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State."[140] The traditionalist interpretation, embraced by the Court in *Glucksberg*, is consistent with this understanding because it allows diversity among state law rights when there exists no stable national

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137 110 U.S. 516, 528 (1884).

138 U.S. CONST. art. IV, § 2.

139 *Id.* amend. XIV, § 1.

140 CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866). For further elaboration of this point see Michael W. McConnell, *The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition?*, 25 LOY. L.A. L. REV. 1159, 1164–68 (1992).

consensus, and requires uniformity with respect to rights after a national consensus has emerged and persisted.

In practice, as interpreted by *Corfield*, *Murray's Lessee*, *Hurtado*, and now *Glucksberg*, this means that an individual may challenge the denial of any right that has been recognized by a sufficiently large number of states for a sufficiently long period of time so that it can truly be said to be part of the fabric of American liberty.[141] In the years after *Corfield*, *Murray's Lessee*, and *Hurtado*, the Supreme Court sometimes exceeded the authority implied by those cases, and invalidated legislation without valid warrant in either express constitutional provisions or the settled judgment of the Nation. The most obvious examples are the decisions known as "the *Lochner* era."[142] In other decisions, which have gained in respect and influence over the years, the Court defined the reaches of unenumerated rights in terms not dissimilar to those in *Corfield*, *Murray's Lessee*, and *Hurtado*.

In his prescient dissent in *Lochner v. New York*,[143] Justice Holmes argued that instead of deciding the case on the basis of their own economic theories, the Justices should rely on "fundamental principles as they have been understood by the traditions of our people and our law."[144] This approach was embraced by the Court in *Snyder v. Massachusetts*.[145] In that case, Justice Cardozo explained that the Fourteenth Amendment protects rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[146]

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141 Analogies might be drawn to the process of divining customary international law from the established practices of many states, or of determining the general common law in the period before *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

142 Justice Souter has suggested that the failing of the *Lochner* line of cases was that they were "absolutist." *Glucksberg*, 117 S. Ct. at 2279, 2281. That is a misunderstanding. Even in the heyday of Lochnerian activism, the Court upheld far more instances of economic regulation than it struck down, and the lines drawn were often subtle. *See* HOWARD GILLMAN, THE CONSTITUTION BESEIGED 7–62; Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379 (1988); Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294 (1913). The problem was not that the Court imposed inflexible or absolutist criteria, but that it exercised judgment and discretion of a sort that is properly reserved to legislatures.

143 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

144 *Id.*

145 291 U.S. 97, 105 (1934).

146 *Id.*; *see also* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (recognizing "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men"); Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality by Powell, J.) ("[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."); Michael H. v. Gerald D., 491 U.S. 110, 122–24 (1989) (plurality) (asserting that protected liberties

Perhaps the leading statement of this approach in the modern period was Justice Harlan's dissenting opinion in *Poe* v. *Ullman*,[147] later to form the basis for his opinion in *Griswold*:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.[148]

This statement is sometimes read as if it authorized judges to draw a balance based on *their own* perceptions of the proper reach of the law, rather than on the balance struck "by the country." But the very point of Justice Harlan's concurrence was to condemn the idea that judges should engage in "unguided speculation" about what freedoms are most important to human life. As the remainder of the *Poe* concurrence shows, Justice Harlan's constitutional analysis was rooted in the actual decisions of state lawmakers in the fifty states. That is why he declared "conclusive" the "utter novelty of this enactment [outlawing the use of contraceptives]."[149] No other state, Harlan found, "has made the *use* of contraceptives a crime."[150] Although Harlan made other comments elaborating reasons why the right to use contraceptives has enjoyed this degree of protection, it was this objective history—not his own moral reasoning, and not any analogies drawn from unrelated cases—that Harlan found "conclusive." The *Poe* concurrence is thus strikingly similar to the *Glucksberg* majority opinion.

If Harlan's interpretive method departed from that in *Corfield*, *Murray's Lessee*, and *Hurtado*, it was in his emphasis on tradition as a "living" thing. It is not necessary, Harlan seemed to be saying, that

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must be "interest[s] traditionally protected by our society").

147 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

148 Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (referring to discussion in *Poe*, 367 U.S. at 542).

149 *Poe*, 367 U.S. at 554-55.

150 *Id.*

the tradition have existed unbroken from the time of the Founding, as implied in *Corfield*, *Murray's Lessee*, and *Hurtado*. It is sufficient—as Harlan's analysis in *Poe* and *Griswold* bears out—that a substantial consensus of the states had recognized the right for a period long enough that it came to represent the will of the Nation.[151] This is consistent with the position implicit in the *Glucksberg* opinion[152] that only those traditions that *survive* have authority. It implies that the rights recognized for purposes of substantive due process may change, slowly, over time.

The traditionalist jurisprudence of *Glucksberg* is therefore defensible not just as a means of cabining judicial discretion and preserving the role of democratic institutions, but as an interpretation of the very language of the Fourteenth Amendment. In using the familiar legal terms "privileges or immunities of citizens" and "due process of law," the framers of the Fourteenth Amendment were invoking a well-established jurisprudence in which the rights of the people were based on a combination of constitutional text (mainly the Bill of Rights) and longstanding custom and usage.

D. The Misappropriation of Justice Harlan

One of the curious side issues in *Glucksberg* was a struggle for the mantle of second Justice Harlan. As discussed above, Justice Harlan sought to describe a judicial role in the definition and enforcement of unenumerated rights under the Due Process Clause that was grounded in judgments of "the nation" rather than the moral philosophical opinions of the judiciary. In this, his opinion anticipated the constitutional methodology articulated by Chief Justice Rehnquist in *Glucksberg*.

In his concurring opinion, however, Justice Souter attempted to invoke Justice Harlan's *Poe* concurrence in support of a more expansive judicial role in determining the substance of due process liberties.[153] But it is difficult to see why Harlan's deeply conservative opinion would give Souter any comfort. Harlan's central insight was that constitutional judicial review under the Due Process Clause *must*

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151 The necessity of viewing tradition as a "living" thing was reaffirmed in *Burnham v. Superior Court*, 495 U.S. 604, 627 (1990) (Scalia, J., opinion joined by Rehnquist, C.J., and Kennedy, J.). In *Burnham*, Justice Scalia explained that when "an overwhelming majority" of states adopts a new policy at variance with the older tradition, this will force the Court to change its understanding of what due process protects. *Id.*

152 *See Glucksberg*, 117 S. Ct. at 2265 ("Though deeply rooted, the States' assisted-suicide bans have in recent years been reexamined and, generally, reaffirmed.").

153 *See Glucksberg*, 117 S. Ct. at 2282–83.

not be based on the judges' own "unguided speculation."[154] The judges must, instead, seek the "balance" that "*our Nation*" has struck. This does not mean that judges are entitled to don the robe of the philosopher king and second-guess the decisions of legislatures. As in *Marbury*, there is no suggestion that the judges are superior to the people in their capacity to determine the proper restraints on government. The judges instead must enforce the will of the people as it is reflected in the traditions which they have developed, as well as the traditions from which they broke.

Justice Souter disagreed with the methodology prescribed by the majority in *Glucksberg* in three important respects. First, rather than insisting that an asserted right be determined to be "fundamental" *before* the court is empowered to balance the right against governmental interests, Souter engaged in "careful scrutiny of the State's contrary claim" on the basis of a lesser showing.[155] Second, in examining the relevant tradition, Souter did not confine the analysis to a carefully defined right asserted in the case. Instead, he based his analysis on supposed similarities to other rights recognized in the past. He found it significant that the states had repealed their criminal prohibitions on suicide (even though they maintained and even strengthened their laws against assisted suicide),[156] that the courts had recognized other constitutional rights related to "bodily integrity" (namely, abortion rights),[157] and that the courts had recognized other constitutional rights that involve "medical counsel and assistance" (abortion again).[158] Under the majority's analysis, these analogies were not persuasive. The rights invoked by Justice Souter, even if analogous in some respects, are easily distinguishable on the basis of practical differences, and the specific asserted right to assisted suicide had been uniformly rejected throughout American history. Third, Justice Souter did not rely on the traditional judgments of "this Nation" as much as on analogies to prior judgments of the Supreme Court.[159]

On each of these points Harlan's opinion supports the majority rather than the concurrence. Harlan, like the majority, "insist[ed] on a threshold requirement that the interest . . . be fundamental before anything more than rational basis justification is required," as Souter

154 *Poe*, 367 U.S. at 542 (emphasis added).
155 *See Glucksberg*, 117 S. Ct. at 2290.
156 *See id.* at 2286–87.
157 *Id.* at 2288.
158 *Id.* at 2288–89, 2290.
159 *Id.* at 2288 (stressing analogies to abortion decisions).

acknowledged in a footnote.[160] Harlan, like the majority, insisted on "exactitude" in defining the asserted right.[161] Rather than describing the asserted right in *Poe* as one to sexual intimacy, privacy, or any other broad category of rights, Harlan analyzed the precise question of the right of married couples to use contraceptives within the privacy of the marital bedroom.[162] And finally, Harlan—like the *Glucksberg* majority—insisted that substantive due process takes its bearings from the judgments of "our Nation," rather than the political morality of the Supreme Court Justices.[163] Thus, for all Justice Souter's emphasis on the *Poe* concurrence, that opinion provides him no support for any of the points on which he disagreed with the majority.

E. Abortion as a Cautionary Note

The abortion decisions have been the most significant cases in modern times in which the Supreme Court departed from the traditional approach to the Due Process Clause. In *Roe v. Wade*,[164] the Court struck down a state law prohibiting abortion notwithstanding the fact that such laws had been in place in almost all the states for at least 100 years.[165] It is easy to see why the Ninth Circuit cited the abortion cases as precedent.[166] The Ninth Circuit found "highly instructive" and "almost prescriptive" a passage from the *Casey* joint opinion that referred to "the most intimate and personal choices a person may make in a lifetime," and which stated: "'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.'"[167] In reversing the Ninth Circuit, the Supreme Court took pains to limit the expansive implications of this passage, stating (implausibly) that *Casey* did not authorize the creation of new fundamental rights not rooted in history and tradition.[168] In effect, the majority limited *Casey* to its facts.

Although there is no reason to think that *Roe*'s specific holding on the right of abortion will be overruled any time soon, *Glucksberg*

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160 *Id.* at 2283 n.9.
161 *Id.* at 2285.
162 *Poe*, 367 U.S. at 536, 539.
163 *Id.* at 530.
164 410 U.S. 113 (1973).
165 *See id.* at 119, 138–39.
166 *See Compassion in Dying*, 79 F.3d at 799–802.
167 *Id.* at 813–14 (quoting *Casey*, 505 U.S. at 851).
168 *See Glucksberg*, 117 S. Ct. at 2271.

makes plain that the decision no longer carries weight on the broader question of how to determine the content of unenumerated rights. Despite its prominence in constitutional theory, the Supreme Court has cited *Roe* in support of a new substantive due process right only once since the case was decided twenty-three years ago, and that case was amply supported by traditional due process methodology.[169] Even before the explicit reformulation of constitutional doctrine in *Glucksberg*, the Court was extraordinarily reluctant to expand the concept of substantive due process.[170] That is a sign of the weakness of *Roe*'s conceptual foundations.

With the perspective of twenty-five years, it is now possible to view the abortion cases with a more dispassionate eye. While abortion rights now have a substantial popular constituency and the Court is unlikely to abandon them, it is apparent to many (even to supporters of the "right to choose") that the Court's sweeping decision, at one stroke, to invalidate the laws of almost every state on a matter that is deeply controversial among the people of this nation, was of questionable legitimacy and even more questionable prudence. Now, a quarter century after the *Roe* decision, the abortion question continues to be the most divisive in American politics, poisoning everything from presidential nominating conventions to the confirmation hearings of Supreme Court Justices. Many supporters of abortion rights believe that those rights would have been achieved with less contention and greater public acceptance if the matter had been left to the political process,[171] as it was in other Western nations.[172] Touching a hot stove can be a kind of precedent.

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169 *See* Moore v. East Cleveland, 431 U.S. 494, 499–500. *Roe* has been cited in several cases involving the right to contraceptives, but in light of *Griswold* these cannot be said to be new substantive due process rights. *See, e.g.*, Carey v. Population Services, 431 U.S. 678, 684–90, 694, 699 (1977). *Roe* was also cited in several equal protection cases, though not in recent years.

170 *See* Reno v. Flores, 507 U.S. 292, 302 (1993); Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992).

171 See Ruth Bader Ginsburg, *Remarks on Women Becoming Part of the Constitution*, 6 LAW & INEQ. J. 17 (1988); Ruth Bader Ginsburg, *Some Thoughts on Autonomy & Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985).

172 *See generally* MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 10–39 (1987).

III. ASSISTED-SUICIDE LAWS ARE NEEDED TO PROTECT VULNERABLE PEOPLE FROM COERCION AND MEDICAL MISTAKE

In summary, the constitutional methodology announced by the Court in *Glucksberg* has a solid basis both in the institutional dynamics of judicial review and in the history and theory of the Fourteenth Amendment. In light of that sound foundation, the clear majority the case commanded on the Court, and the lack of any competing methodology commanding substantial support on the Court, it is likely that *Glucksberg* will be a lasting and powerful precedent. That is cause for celebration. *Glucksberg* represents a healthy swing of the pendulum away from unguided judicial power and toward the power of decentralized, representative institutions.

There is another reason for celebration as well: on the merits, the Court's rejection of the asserted right to assisted suicide was wise and humane, and may have averted a national moral disaster. While it is possible that some individual states will legalize assisted suicide in some narrow contexts, and likely that medical practice will continue to evolve in this area, the Court made a significant contribution to stopping what had appeared to be an ideological juggernaut, which would have disserved the interests of the very people it purported to protect. Not only has the Court provided time for reflection on the difficult questions touching on the end of life, but the decision, and the publicity surrounding it, has called attention to serious and sober arguments against the recognition of any right to assisted suicide.

Thoughtful and experienced doctors, ethicists, philosophers, lawyers, theologians, and advocates for patients have offered cogent reasons why assisted suicide should not receive the formal sanction of law. The professional associations in the disciplines closest to the problem—the American Medical Association, the American Psychological Association, the American Geriatrics Society, and the American Bar Association among them—have all concluded that assisted suicide should not be made legal. The two most comprehensive and respected studies undertaken of the issue—one under the auspices of the State of New York and one under the auspices of the British House of Lords—both resulted in *unanimous* recommendations that laws against assisted suicide (as well as euthanasia) should be retained.[173] Although there are many

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173 *See* NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, WHEN DEATH IS SOUGHT: ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT 120 (1994) [hereinafter NEW YORK REPORT]; HOUSE OF LORDS, SESS. 1993-94 REPORT OF THE SELECT

arguments in favor of laws prohibiting assisted suicide, I will summarize four of the most important.

First, even assuming for sake of argument that in a limited number of cases assisted suicide might be ethically permissible, many knowledgeable observers believe that the problems of abuse would be so widespread and uncontrollable that formal legal and ethical prohibition is necessary.[174] The harsh reality is that a more expeditious death for terminally ill patients would often serve the interests of others, especially in this era of managed care and exploding medical costs. A patient weakened by illness and pain is peculiarly susceptible to influence from family members or doctors who are in a position of trust.[175] It would not be difficult for these individuals, for their own reasons, to exert subtle—but powerful—pressure on a frail patient to "choose" the convenient option of a speedy death. Even the suggestion by a well-meaning doctor that a patient should consider the option of death will inevitably convey the message that—in the doctor's informed professional opinion—the patient's life is no longer worth living.[176]

For every suffering person who makes a rational, informed choice to die, there will be others—perhaps many times as many—on whom that "choice" is effectively imposed. And there will be no way to tell the difference.

To be sure, safeguards have been proposed. Indeed, the Ninth Circuit professed faith that "sufficient protections" can be enacted.[177] Unfortunately, these were expressions of hope rather than descriptions of experience. Many physicians and ethicists doubt that effective safeguards can be devised or enforced—especially since typically no one involved in the death will have the incentive to expose wrongdoing, and the interactions involved are cloaked in the confidentiality of the doctor-patient relationship. The American Medical Association's code of Medical Ethics, for example, rules out physician-assisted suicide partly on the ground that it "would be

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COMMITTEE ON MEDICAL ETHICS 58 (1994).

174 *See* NEW YORK REPORT, *supra* note 173, at xii, 102, 119–20, 140.

175 *See id.* at 89.

176 *See Assisted Suicide in the United States: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 113 (1996) [hereinafter *Hearing*] (statement of Dr. Herbert Hendin); Leon R. Kass & Nelson Lund, *Physician-Assisted Suicide, Medical Ethics and the Future of the Medical Profession*, 35 DUQ. L. REV. 395, 409 (1996).

177 *Compassion in Dying*, 79 F.3d at 833.

difficult or impossible to control."[178]

The specter of widespread abuse and exploitation is not based on mere speculation. Studies of assisted suicide and euthanasia in the Netherlands, where safeguards are stringent on paper, show that those safeguards are routinely disregarded.[179] Although medical guidelines recognize the right to die only if based on the patient's own informed and voluntary decision, a survey of 300 physicians disclosed that over forty percent had performed euthanasia *without* explicit consent.[180] In 1990, in addition to 2,300 cases of active euthanasia with consent and 400 cases of assisted suicide, there were over 1,000 cases of active nonvoluntary euthanasia performed without the patient's knowledge or consent, including roughly 140 (fourteen percent) where the patient was fully competent.[181] Comparable rates of nonvoluntary euthanasia in the United States would be roughly 20,000 per year.[182] And these numbers do not even include cases where "consent" was extracted by means of undue influence, psychological coercion, or skewed information.

Giving choices to the vulnerable is not always liberating. A young woman is not more "free" if the law allows her to contract with a pimp; a young man is not more "free" if a pusher can sell him crack cocaine; a child is not more "free" if he can "consent" to sexual advances by adults; people are not more "free" if they can voluntarily sell themselves into slavery. Nor is an ill person necessarily more "free" if he can agree to kill himself. Indeed, the mere availability of assisted suicide as a socially-legitimated alternative may impel some who would prefer to live to accept this course out of feelings of guilt

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178 AMERICAN MED. ASS'N, COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, CODE OF MEDICAL ETHICS, CURRENT OPINIONS WITH ANNOTATIONS 2.211 (1994). For an extensive discussion of these issues, see Daniel Callahan & Margot White, *The Legalization of Physician-Assisted Suicide: Creating a Regulatory Potemkin Village*, 30 U. RICH. L. REV. 1 (1996). *See also* NEW YORK REPORT, *supra* note 173, at 73; *Hearing*, *supra* note 176, at 316–17 (statement of Dr. Lonnie Bristow on behalf of the American Medical Association: "[I]t is difficult to imagine adequate safeguards which could effectively guarantee that patients' decisions to request assisted suicide were unambivalent, informed and free of coercion . . . ."); *id.* at 115 (statement of Dr. Herbert Hendin).

179 CARLOS F. GOMEZ, REGULATING DEATH: EUTHANASIA AND THE CASE OF THE NETHERLANDS 127–33 (1991).

180 *See* John Keown, *Some Reflections on Euthanasia in the Netherlands*, *in* EUTHANASIA, CLINICAL PRACTICE AND THE LAW 193, 209 (Luke Gormally ed., 1994).

181 *See* John Keown, *Further Reflections on Euthanasia in the Netherlands in the light of the Remmelink Report and the Var Der Mass Survey*, *in* EUTHANASIA, CLINICAL PRACTICE AND THE LAW, *supra* note 180, at 230.

182 *See id.* at 221–23; Callahan & White, *supra* note 178, at 15–18; GOMEZ, *supra* note 179, at 1–18; *Hearing*, *supra* note 176, at 106–13, 114–15 (statement of Dr. Herbert Hendin).

or shame about the burdens (financial and otherwise) that the choice of continued living would impose on their families. This is not a matter of some people "imposing their morality" on others. It is a matter of all citizens reflecting on the conditions that they may face at the end of life, and establishing rules that will protect all of us when we are weakest and most vulnerable.

Second, if death is defined as a "mercy," it will be difficult to justify refusing this mercy to broader and broader categories of sufferers. It is therefore misleading to confine one's attention (as the lower courts did) to "competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors."[183] For example, the moral arguments supporting assisted suicide for terminally ill patients who are able to self-administer the killing agent apply just as strongly to similar patients who cannot do the deed for themselves. Thus, if the logic supporting assisted suicide is valid, there is no sound reason to resist voluntary active euthanasia.[184] And the moral arguments supporting assisted suicide for the terminally ill apply with as much force—maybe more—to persons who face not a few weeks or months, but years of pain that seems to them intolerable. Thus, assisted suicide for the terminally ill will almost surely merge into assisted suicide for those with incurable chronic conditions.[185] Persons with serious disabilities will be particularly at risk.[186] And (as cases like *Cruzan*[187] so eloquently demonstrate), the argument for assisted suicide for competent adults will apply with seemingly equal force to those unable to consent for themselves, whose "right to die" will be exercised by surrogates. If death is seen as a mercy, why confine it to those fortunate enough to be able to consent? The same corrosive skepticism that the advocates of assisted suicide evince toward the distinction between refusal of

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183 *Compassion in Dying*, 79 F.3d at 838. It is a striking example of the illogic of the decisions below that they declare the longstanding distinction between assisted suicide and refusal of life-sustaining treatment to be a distinction without a difference, only to propose new distinctions that have far less logical, empirical, or ethical justification. *See* Yale Kamisar, *The "Right to Die": On Drawing (And Erasing) Lines*, 35 DUQ. L. REV. 481, 483–85 (1996).

184 *See* Kamisar, *supra* note 183, at 513–19; Dan W. Brock, *Voluntary Active Euthanasia*, HASTINGS CTR. REP., Mar.–Apr. 1992, at 10, 11. Indeed, the Ninth Circuit intimated that it did not regard the distinction between assisted suicide and active voluntary euthanasia as significant. *See Compassion in Dying*, 79 F.3d at 831–32.

185 *See* Kamisar, *supra* note 183, at 502–13.

186 *See Hearing*, *supra* note 176, at 53–70 (statements of Diane Coleman and Carol Gill).

187 Cruzan v. Missouri Dept. of Health, 497 U.S. 261 (1990) (holding that Constitution does not forbid state from requiring clear and convincing evidence of an incompetent's wishes regarding withdrawal of life-sustaining equipment).

treatment and active assisted suicide would be equally potent to dissolve all of the other limitations on this newfound right.

It is even difficult to understand why the "mercy" of assisted suicide should be denied to persons who, for reasons other than ill health, conclude that the suffering of life is unbearable. Physical pain and impending death are not the only—and not necessarily the most serious—reasons to desire a release from these mortal coils. Patients are free to refuse life-sustaining treatment for any reason whatsoever. Once we conclude that death is a matter of personal autonomy—of privacy—where can we stop?[188]

Third, if patients' requests for assistance in suicide are honored, many will die unnecessarily, as a result of medical mistake. According to medical experts, the desire to commit suicide (even among the terminally ill) is typically associated with clinical depression, which is a treatable disease.[189] The New York State Task Force reported: "Studies that examine the psychological background of individuals who kill themselves show that 95 percent have a diagnosable mental disorder at time of death. Depression, accompanied by symptons of hopelessness and helplessness, is the most prevalent condition among individuals who commit suicide."[190] When treated for depression, patients typically cease to desire suicide.[191]

Much of the desire to commit suicide is also traceable to insufficiently aggressive measures to alleviate pain.[192] When a suicidal patient is helped to deal with pain and depression, his or her natural desire to live typically is restored. To give patients the "right" to obtain assistance in suicide is to license the killing of persons who often are simply in need of help, which modern medicine can give. Professor Herbert Hendin, a professor of psychiatry at New York Medical College, testified:

> Patients who request euthanasia are usually asking in the strongest way they know for mental and physical relief from

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188 The implications of this decision extend beyond assisted suicide and euthanasia. For example, what will be the effect on laws allowing the use of physical force to prevent suicide?

189 *See Hearing, supra* note 176 (statement of Dr. Herbert Henin).

190 NEW YORK REPORT, *supra* note 173, at 11; *see also id.* at 13 ("In one study of terminally ill patients, of those who expressed a wish to die, all met diagnostic criteria for major depression."); J.H. Brown et al., *Is It Normal for Terminally Ill Patients to Desire Death?*, 143 AM. J. OF PSYCHIATRY 208 (1986).

191 NEW YORK REPORT, *supra* note 173, at 26 (reporting that treatment of depression "resulted in the cessation of suicidal ideation for 90 percent of these patients").

192 NEW YORK REPORT, *supra* note 173, at 16-17; *Hearing, supra* note 176, at 309–10 (statement of Dr. Lonnie Bristow on behalf of the American Medical Association).

> suffering. When that request is made to a caring, sensitive, and knowledgeable physician who can address their fear, relieve their suffering, and assure them that he or she will remain with them to the end, most patients no longer want to die and are grateful for the time remaining to them.[193]

Since American doctors are notoriously uninformed about proper pain prevention techniques,[194] as well as depression,[195] it is almost certain that many people will be induced to die when instead they could receive effective palliative treatment.[196] The ethical problem is magnified by the fact that economically disadvantaged patients and members of racial and ethnic minorities are the most likely to lack proper treatment for pain and depression, and thus the most likely to "choose"—unnecessarily—to die.[197] Other groups especially at risk are women and the elderly.[198]

Fourth, and most fundamentally, by making death a legally available "choice," we would inevitably change the way our culture perceives the final stages of life. When death is not an official option, the focus of the patient, the patient's family, the doctor, and the system is on what can be done to make the patient's life easier and better. If death becomes an approved social option, both the patient and the system will tend, instead, to focus on whether continued care is "worth it." The patient, aware of the burden she is imposing on loved ones, may well conclude that she "owes it" to her family to commit suicide. The decision to cling to life will come to be regarded as wasteful, irrational, and selfish. In the uniquely vulnerable circumstances of the suffering patient, the "right to die" will become, for many, the moral duty to die.[199] One blessing of the current law is that it relieves the elderly and the infirm of the need to justify their continued existence.

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193 *Hearing, supra* note 176, at 115–16.

194 *See* NEW YORK REPORT, *supra* note 173, at 33 (reporting that "pain is often overlooked by health care providers"); *id.* at 43 (stating that "the delivery of pain relief is grossly inadequate in clinical practice"); *Hearing, supra* note 176, at 18–20 (statement of Dr. Kathleen Foley, Chief of Pain Service at Memorial Sloan-Kettering Cancer Center).

195 NEW YORK REPORT, *supra* note 173, at 32; *id.* at 32–33 (reporting study finding that fewer than fifteen percent of depressed residents of nursing home for elderly had been correctly diagnosed, and fewer than twenty-five percent had been treated for depression).

196 *See id.* at 40 (noting that "modern pain relief techniques can alleviate pain in all but extremely rare cases"); *Hearing, supra* note 176, at 310, 314–15 (statement of Dr. Lonnie Bristow on behalf of the American Medical Association).

197 NEW YORK REPORT, *supra* note 173, at 44, 46; *Hearing, supra* note 176, at 412 (statement of Dr. Carlos Gomez).

198 NEW YORK REPORT, *supra* note 173, at 44; *see also id.* at 33.

199 *See* NEW YORK REPORT, *supra* note 173, at 95.

Even if the laws against assisted suicide are rarely enforced, they still have the effect of expressing society's deep commitment to the protection of human life. In combination with the ethical precepts of the medical profession, these laws ensure that assisted suicide remains a highly exceptional activity, rarely suggested or initiated by physicians. If assisted suicide is recognized as a "right," it will become both routinized and common. It is not obvious that the change would be for the better.

IV. CONCLUSION

Last Term, the United States Supreme Court unanimously reversed the decisions of two federal courts of appeals holding that competent, terminally ill adults have a constitutional right to procure the assistance of their physicians in ending their lives.[200] This was probably the most important constitutional case involving a claim of unenumerated individual rights in the past twenty years. Not only did the Court resolve a substantive issue of great sensitivity and importance (leaving the answer to the people of the various states), but it announced a decisive shift in constitutional doctrine regarding unenumerated rights. The assisted suicide decision marked the end of an era characterized by cases, like *Roe,* in which the Justices took upon themselves the right to decide contentious issues of moral and social policy, independent of text, history, or democratic judgment. The Court articulated an approach under which the decisions of democratically accountable institutions regarding questions of morality and social policy will not be second-guessed by the courts unless there is a firm basis for doing so either in the constitutional text or in "[o]ur Nation's history, legal traditions, and practices."[201] In so doing, the Court not only took a major step toward restoring the proper balance between courts and legislatures under the Fourteenth Amendment, but also helped to preserve a wise and humane policy of protecting vulnerable patients at the end of their lives.

It is easy to criticize decisions of the Supreme Court. It is also important to recognize those occasions when the Court has rendered the nation a service. *Washington v. Glucksberg* was such a case.

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200 Washington v. Glucksberg, 117 S. Ct. 2258 (1997), *rev'g* Compassion in Dying v. Washington, 79 F.3d 790 (9th Cir. 1996) (en banc); Vacco v. Quill, 117 S. Ct. 2293 (1997), *rev'g* 80 F.3d 716 (2d Cir. 1996).

201 *Glucksberg,* 117 S. Ct. at 2268.