

Spring 1998

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Recommended Citation

Brett Feinberg, The Court Upholds A State Law Prohibiting Physician-Assisted Suicide, 88 J. Crim. L. & Criminology 847 (Spring 1998)

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THE COURT UPHOLDS A STATE LAW PROHIBITING PHYSICIAN-ASSISTED SUICIDE

Vacco v. Quill, 117 S. Ct. 2293 (1997)

I. INTRODUCTION

In *Vacco v. Quill*,¹ the United States Supreme Court addressed whether a terminally ill person has a constitutionally protected right to commit suicide with the assistance of a physician.² The Court held that state laws prohibiting physician-assisted suicide are constitutionally permissible since they do not violate the Equal Protection Clause.³ In making its decision, the Court determined that the right to die with assistance is not a fundamental right.⁴ The Court also concluded that the withdrawal of lifesaving medical treatment is distinguishable from physician-assisted suicide.⁵

This Note argues that the Supreme Court incorrectly concluded that the right to die with assistance is not a fundamental right.⁶ In addition, this Note contends that the Court improperly distinguished withdrawal of lifesaving equipment from physician-assisted suicide.⁷ This Note further argues that the state has no legitimate interest in preventing terminally ill patients from seeking assistance from a physician to hasten their death.⁸ Finally, this Note addresses the ramifications of the Court's decision.⁹

¹ 117 S. Ct. 2293 (1997).

² *Id.*

³ *Id.* at 2302.

⁴ *Id.* at 2297.

⁵ *Id.* at 2297-98.

⁶ See *infra* notes 182-213 and accompanying text.

⁷ See *infra* notes 214-25 and accompanying text.

⁸ See *infra* notes 226-41 and accompanying text.

⁹ See *infra* notes 242-48 and accompanying text.

II. BACKGROUND

A. THE "RIGHT TO DIE"

Physician-assisted suicide involves a doctor's performance of an act that results in the patient's death.¹⁰ The debate over physician-assisted suicide begins with the judicially recognized "right to die."¹¹ The term "right to die" refers to an individual's right to discontinue lifesaving medical treatment, even though the patient will die if treatment is ended.¹²

The "right to die" developed as a judicial response to patients' desires to make critical decisions regarding their own treatment, decisions traditionally left to the discretion of the doctor.¹³ Beginning with the 1976 case *In re Quinlan*,¹⁴ courts, physicians, and the public grew to accept the idea that patient autonomy, in certain circumstances, extends to life-or-death treatment decisions. The New Jersey Supreme Court was the first court to issue a written decision recognizing the right to refuse life-sustaining treatment in *Quinlan*.¹⁵ The case involved Karen Ann Quinlan, a twenty-two-year-old female who was in a persistent vegetative state.¹⁶ The condition resulted from two fifteen-minute periods in which she had stopped breathing.¹⁷ Karen's parents wanted to disconnect their daughter's respirator and other devices which were keeping her alive.¹⁸

The New Jersey Supreme Court held that Karen had a constitutional right to be removed from the lifesaving treatment and that her guardian father could exercise that right on her behalf.¹⁹ The court explained that this right to die emanated from the constitutional right of privacy.²⁰ Although the court

¹⁰ Note, *Physician-Assisted Suicide and the Right to Die With Assistance*, 105 HARV. L. REV. 2021, 2023 (1992) [hereinafter *Physician-Assisted Suicide*].

¹¹ *Id.* Both advocates and opponents of physician-assisted suicide often refer to the "right to die" in espousing their views.

¹² *Id.* at 2021-22.

¹³ *Id.* at 2022.

¹⁴ 355 A.2d 647 (N.J. 1976).

¹⁵ *Id.* at 671.

¹⁶ *Id.* at 654.

¹⁷ *Id.*

¹⁸ *Id.* at 656.

¹⁹ *Id.* at 671.

²⁰ *Id.* at 663. The court indicated that the right to die implicated concepts of theology, medicine, and the law. *Id.* The court argued that if the right of privacy is broad enough to include a woman's decision to terminate her pregnancy under cer-

acknowledged that the state had a strong interest in preserving life, it reasoned that the state's interest is attenuated when there is no chance of the patient regaining cognitive life and is outweighed by the attendant bodily invasion necessitated by medical care.²¹

Thus, *Quinlan* established precedent permitting terminally ill patients to withdraw from lifesaving treatment. More importantly, *Quinlan* lay the foundation for the principle later espoused by the Supreme Court: A patient has the right to end life-sustaining treatment so long as there is clear and convincing evidence of the individual's wish for withdrawal of treatment.²²

The Supreme Court addressed the "right to die" in *Cruzan v. Director, Missouri Department of Health*.²³ *Cruzan* presented the issue of whether a state may prohibit the withdrawal of life-sustaining treatment. In *Cruzan*, the plaintiffs' daughter, Nancy Beth Cruzan, was severely injured in a car accident.²⁴ After remaining in a coma for three weeks, she slipped into a persistent vegetative state, "a condition in which a person exhibits motor reflexes but evinces no indications of significant cognitive function."²⁵ In order to keep her alive, feeding and hydration tubes were implanted in her stomach.²⁶

With no hope that Nancy's condition would improve, her parents requested that the hospital end the lifesaving treatment.²⁷ The hospital, however, refused to do so without a court order.²⁸ Accordingly, Nancy's parents filed a declaratory judgment action to terminate the artificial hydration and nutrition being supplied to their daughter.²⁹ They argued that Nancy had

tain circumstances, it is also broad enough to include a patient's decision to end life-saving medical treatment in certain instances. *Id.* (comparing *Roe v. Wade*, 410 U.S. 113 (1973)). The court also explained that the basis for the constitutional right to privacy "exists in the penumbras of specific guarantees of the Bill of Rights formed by emanations from those guarantees that help give them life and substance." *Id.* (quoting *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965)).

²¹ *Id.* at 664.

²² See *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 286-87 (1990).

²³ *Id.* at 261.

²⁴ *Id.* at 266.

²⁵ Benjamin C. Zipursky, Note, *The Pedigrees of Rights and Powers in Scalia's Cruzan Concurrence*, 56 U. PITT. L. REV. 283, 289 (1994).

²⁶ *Cruzan*, 497 U.S. at 266.

²⁷ *Id.* at 267.

²⁸ *Id.* at 268.

²⁹ *Id.* at 267.

a Fourteenth Amendment³⁰ right not to be kept alive by unwanted medical procedures.³¹

The state probate court held that Nancy had a state and a federal constitutional right to refuse treatment.³² However, the Missouri Supreme Court reversed the probate court and held that since Nancy was unable to make any judgments, she did not have a right to refuse life-sustaining treatment.³³ The court argued that the state interest in preserving life "outweighs any rights invoked on Nancy's behalf to terminate treatment in the face of the uncertainty of Nancy's wishes and her own right to life."³⁴ The Cruzans appealed and the U.S. Supreme Court granted certiorari.³⁵

The Supreme Court upheld the Missouri Supreme Court's decision, ruling that Missouri's continuation of lifesaving treatment did not violate Nancy's Fourteenth Amendment rights.³⁶ The Court determined that a competent adult has a right to refuse lifesaving treatment based on the common law right to informed consent to treatment and on privacy or liberty interests found in the Constitution.³⁷ The Court explained that, although an individual has a liberty interest under the Due Process Clause of the Fourteenth Amendment,³⁸ the inquiry does not end there.³⁹ Rather, to ascertain whether an individual's rights

³⁰ The Fourteenth Amendment to the United States Constitution provides in part: No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

³¹ *Cruzan*, 497 U.S. at 268.

³² *Id.*

³³ *Cruzan v. Director, Mo. Dep't of Health*, 760 S.W.2d 408, 426 (Mo. 1988) (en banc).

³⁴ *Id.*

³⁵ *Cruzan v. Director, Mo. Dep't of Health*, 492 U.S. 917 (1989).

³⁶ *Cruzan*, 497 U.S. at 287.

³⁷ *Id.* The *Cruzan* Court cited previous cases which discussed both the common law right to informed consent to treatment and the constitutional privacy/liberty interests. See *In re Drabick*, 245 Cal. Rptr. 840 (Cal. Ct. App. 1988); *In re Conroy*, 486 A.2d 1209 (N.J. 1985) (holding that the right to self-determination ordinarily outweighs any countervailing state interests, and that competent persons are permitted to refuse lifesaving medical treatment).

³⁸ See *supra* note 30.

³⁹ *Cruzan*, 497 U.S. at 279.

have been violated, a court must "balance his liberty interests against the relevant state interests."⁴⁰

Second, the Court stated that when a patient is incompetent, lifesaving treatment will not be discontinued unless there is clear and convincing evidence that the incompetent individual would want to withdraw treatment.⁴¹ The Court determined that there was not clear and convincing evidence that Nancy would have wanted the lifesaving procedures terminated; accordingly, the Court upheld the Missouri Supreme Court's ruling.⁴² However, although the Court did not permit Nancy's parents to end their daughter's lifesaving treatment, it did recognize for the first time that the "right to die" can exist in other factual contexts.⁴³

B. THE RIGHT TO PHYSICIAN-ASSISTED SUICIDE

Historically, most societies have discouraged acts of physician-assisted suicide.⁴⁴ This view is demonstrated in the Hippocratic Oath⁴⁵ which states, "I will give no deadly medicine to anyone if asked, nor suggest such counsel"⁴⁶ In ancient times, suicide was a criminal offense, punishable by forfeiture of property to the king and a dishonorable burial.⁴⁷ An individual who assisted in a suicide was guilty of murder since he was a "second-degree principal to the death."⁴⁸ Today, no state treats

⁴⁰ *Id.* Missouri claimed that its interest in the protection and preservation of human life outweighed the interests of Nancy's parents in ending her lifesaving treatment. *Id.* at 280-81.

⁴¹ *Id.* at 282. The requisite evidence consists of "proof sufficient to persuade the trier of fact that the patient held a firm and settled commitment to the termination of life supports under the circumstances like those presented." *Id.* at 285 (quoting *In re Westchester County Med. Ctr.*, 531 N.E.2d 607, 613 (N.Y. 1988)).

⁴² *Id.* at 286-87.

⁴³ *Id.*

⁴⁴ Willard C. Shih, Note, *Assisted Suicide, the Due Process Clause and "Fidelity in Translation,"* 63 *FORDHAM L. REV.* 1245, 1273 (1995).

⁴⁵ See A. CASTIGLIONI, *HISTORY OF MEDICINE* 148 (E. Krumbhaar trans., Knopf Publ. 2d ed. 1947) (1941).

⁴⁶ *Id.* at 154.

⁴⁷ Note, *The Punishment of Suicide—A Need for Change*, 14 *VILL. L. REV.* 463, 465 (1969).

⁴⁸ Sue Woolf Brenner, Note, *Undue Influence in the Criminal Law: A Proposed Analysis of the Criminal Offense of "Causing Suicide,"* 47 *ALB. L. REV.* 62, 64 (1982).

suicide itself as a felony, although most states have retained laws criminalizing assisted suicide.⁴⁹

In 1995, the issue of assisted suicide came to the forefront of legal debate when an Oregon district court⁵⁰ held that a law authorizing physician-assisted suicide violates the Equal Protection Clause.⁵¹ In *Lee v. Oregon*, a court for the first time analyzed whether physician-assisted suicide violated the Equal Protection Clause.⁵² The plaintiffs⁵³ claimed that Oregon's "Death With Dignity Act"⁵⁴ violates the Equal Protection Clause, arguing that its classification of terminally ill patients is not rationally related to a legitimate state interest.⁵⁵ The court agreed with the plaintiffs and held the act unconstitutional.⁵⁶

In finding the law unconstitutional, the court described several inadequacies of the Act's protections for the terminally ill.⁵⁷ In addition, the court found no rational relationship between the state interests and the terminally ill/non-terminally ill distinction.⁵⁸ *Lee v. Oregon* was the first time a court found a statute

⁴⁹ Shih, *supra* note 44, at 1277-78. For a further discussion of the history of suicide and assisted suicide, see *infra* notes 186-98 and accompanying text.

⁵⁰ *Lee v. Oregon*, 891 F. Supp. 1429 (D. Or. 1995).

⁵¹ See *supra* note 30. The Equal Protection Clause of the Fourteenth Amendment guarantees that similarly situated persons will be treated alike under the law. See *id.* Legislation is presumed valid under the clause if "a classification drawn by a statute is rationally related to a legitimate state interest." *Schweiker v. Wilson*, 450 U.S. 221 (1981).

⁵² *Lee*, 891 F. Supp. at 1429.

⁵³ The plaintiffs consisted of Gary Lee, William Petty, Eric Dutson, Janice Elsnar, Claudine Sottler, Jeffrey M. Weinkauf, Fritz Beck, June Beck, Sister Geraldine Bernards, and Maryville Nursing Home. *Id.*

⁵⁴ In 1994, Oregon passed the "Oregon Death With Dignity Act" and became the first state to permit physician-assisted suicide for the terminally ill. *Id.* at 1437.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See *id.* at 1434-37. Some of the inadequacies included: that the "procedures designed to differentiate between the competent and incompetent are not sufficient;" that there is "inadequate mental evaluation," thereby failing to detect depression; and that the "act does not provide for an independently chosen consulting physician to confirm that a person is capable and acting voluntarily." *Id.*

⁵⁸ *Id.* The court found three aspects of the Act to be unconstitutional: (1) the provision of the Act "which establishes procedure for determining whether patient was competent to opt for assisted suicide by referral through attending physician was not rationally related to any legitimate state interest for equal protection purposes;" (2) the provision of the act which establishes a subjective good faith standard of care for physicians was also not rationally related to any legitimate state interest; and (3) the Act failed to ensure that the decision to commit suicide was voluntary. *Id.*

permitting physician-assisted suicide to be unconstitutional on equal protection grounds.

Recently, the Supreme Court analyzed whether physician-assisted suicide violates the Due Process Clause.⁵⁹ The Due Process Clause of the Fourteenth Amendment⁶⁰ protects individuals from government interference in fundamental rights and liberty interests.⁶¹ In *Washington v. Glucksberg*,⁶² the Supreme Court held that the asserted right to physician-assisted suicide is not a fundamental liberty interest protected by the Due Process Clause.⁶³

In 1994, three terminally ill patients, four physicians, and a nonprofit organization challenged a Washington statute⁶⁴ prohibiting assisted suicide, arguing that it violated the Due Process and Equal Protection Clauses of the Constitution.⁶⁵ The District Court for the Western District of Washington found the statute unconstitutional,⁶⁶ upon which the State of Washington appealed.⁶⁷ The Ninth Circuit, in a 2-1 decision, concluded that there was no constitutional basis to invalidate the statute and reversed the lower court's decision.⁶⁸ Subsequently, the Ninth

⁵⁹ *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

⁶⁰ See *supra* note 30.

⁶¹ See *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992). In *Casey*, the Court determined that states may restrict abortion so long as they do not place an "undue burden" on the woman's right to choose. *Id.* Fundamental rights are protected by the Due Process Clause of the Fourteenth Amendment. A right is fundamental if: (1) it is deeply rooted in this Nation's history and tradition; or (2) it is implicit in the concept of "ordered liberty." *Glucksberg*, 117 S. Ct. at 2268.

⁶² *Glucksberg*, 117 S. Ct. at 2258.

⁶³ *Id.* at 2275.

⁶⁴ WASH. REV. CODE § 9A.36.0601(1) (1994).

⁶⁵ *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1456 (W.D. Wash. 1994).

⁶⁶ *Id.* at 1467. The district court found the statute unconstitutional for two reasons. First, the statute violated a constitutionally guaranteed liberty interest. *Id.* at 1459-62. Citing *Casey*, the court explained that the Due Process Clause permits a patient to make personal decisions regarding his or her own dignity and autonomy. *Id.* The court also analyzed *Cruzan*, which acknowledged an individual's right to refuse lifesaving medical treatment. *Id.* at 1461-62. On the basis of these two cases, the court concluded that there is no constitutional distinction between withdrawing lifesaving treatment and physician-assisted suicide. *Id.* at 1462. Second, the court held that the statute violated the Equal Protection Clause since competent, terminally ill people on life support may quicken their deaths by refusing life-sustaining treatment while those not on life support may not receive assistance in hastening their deaths. See *id.* at 1466-67.

⁶⁷ *Compassion in Dying v. Washington*, 49 F.3d 586 (9th Cir. 1995).

⁶⁸ *Id.* at 594.

Circuit *en banc* determined that the statute violated the Due Process Clause and affirmed the district court's decision.⁶⁹

The Supreme Court reversed the decision of the Ninth Circuit, holding that statutes prohibiting physician-assisted suicide do not violate the Due Process Clause of the Fourteenth Amendment.⁷⁰ Writing for the majority, Chief Justice Rehnquist began with an historical analysis of assisted suicide from which he concluded that society has made it a crime to assist in a suicide.⁷¹ The Chief Justice then addressed the due process issue, explaining that the Due Process Clause is to be applied only in narrow circumstances.⁷² The Court determined that the Washington statute does not present one of these circumstances; it does not involve a liberty specially protected by the clause.⁷³ First, Chief Justice Rehnquist stated that "legal doctrine" and "state policy" indicate that there is no right to assisted suicide.⁷⁴ He cited both *Cruzan* and *Casey* in support of his conclusion that the law historically has prohibited assisted suicide.⁷⁵ Both cases, according to Chief Justice Rehnquist, stand for the proposition that "the asserted right to assistance in committing suicide is not

⁶⁹ *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) (*en banc*), *rev'd sub nom. Washington v. Glucksberg*, 117 S. Ct. 2258 (1997). First, the Ninth Circuit determined that "choosing the time and manner of one's death constitutes a liberty interest," *id.* at 798, a finding based on case law regarding personal decisions about marriage, procreation, and family life. *See id.* at 800-02, 812-16. Although the court concluded that the "right to die" is not a fundamental right, it characterized it as a strong interest. *Id.* at 802-05. Second, the *en banc* court discussed six interests: "(1) preserving life; (2) preventing suicide; (3) avoiding the involvement of third parties and use of arbitrary, unfair, or undue influence; (4) protecting family members and loved ones; (5) protecting the integrity of the medical profession; (6) avoiding the future movement toward euthanasia and other abuses." *Id.* at 816. The court then held that these interests do not outweigh a terminally ill patient's desire to hasten death. *Id.* at 836-37. Ultimately, the court concluded that a ban on assisted suicide violates the Due Process Clause. *Id.* at 838.

⁷⁰ *Washington v. Glucksberg*, 117 S. Ct. 2258, 2262 (1997).

⁷¹ *Id.* Chief Justice Rehnquist stated, "In almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide. The States' assisted-suicide bans are not innovations. Rather, they are longstanding expressions of the States' commitment to the protection and preservation of all human life." *Id.* at 2263.

⁷² *Id.* at 2267. Rehnquist explained, "We ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this uncharted area are scarce and open-ended." *Id.*

⁷³ *Id.* at 2269.

⁷⁴ *Id.*

⁷⁵ *Id.* at 2269-71.

a fundamental liberty interest protected by the Due Process Clause."⁷⁶

Finally, the Court declared that the State of Washington's ban on assisted suicide is rationally related to legitimate government interests.⁷⁷ The Court explained that, since the interests are "at least reasonably related to their promotion and protection," it is not necessary to weigh their strengths.⁷⁸ Therefore, under *Glucksberg*, state statutes banning physician-assisted suicide do not violate the Due Process Clause of the Fourteenth Amendment.⁷⁹

III. FACTS AND PROCEDURAL HISTORY

In the State of New York, it is a crime to cause or aid another to commit suicide or to attempt suicide.⁸⁰ On July 20, 1994, three physicians⁸¹ and three terminally ill patients⁸² brought suit against New York's Attorney General,⁸³ claiming that New York's law against assisted suicide is unconstitutional.⁸⁴ The plaintiffs alleged that the Fourteenth Amendment guarantees the liberty of mentally competent, terminally ill adults with no chance of recovery to make decisions about the end of their lives,⁸⁵ that the right to assisted suicide is a fundamental right, and that New York's laws are unconstitutional under the Due

⁷⁶ *Id.* at 2271.

⁷⁷ *Id.* at 2272. For a list of the state interests, see discussion *supra* note 69.

⁷⁸ *Glucksberg*, 117 S. Ct. at 2275.

⁷⁹ *Id.*

⁸⁰ New York Penal Law § 125.15 provides: "A person is guilty of manslaughter in the second degree when: . . . (3) He intentionally . . . aids another person to commit suicide. A violation of this provision is classified as a class C felony." N.Y. PENAL LAW § 125.15 (McKinney 1987). New York Penal Law § 120.30 provides: "A person is guilty of promoting a suicide attempt when he intentionally . . . aids another person to attempt suicide. A violation of this provision is classified as a class E felony." *Id.* § 120.30.

⁸¹ The physicians were Dr. Timothy E. Quill, Dr. Samuel G. Klagsbrun, and Dr. Howard A. Grossman. See *Vacco v. Quill*, 117 S. Ct. 2293, 2296 (1997).

⁸² The patients were Jane Doe, George Kingsley, and William A. Barth. All have since died. *Id.*

⁸³ The New York Attorney General during the district court hearing was Oliver Koppell. See *Quill v. Koppell*, 870 F. Supp. 78 (S.D.N.Y. 1994). Koppell was later replaced by Dennis Vacco. See *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996).

⁸⁴ *Quill*, 870 F. Supp. at 80.

⁸⁵ *Id.*

Process Clause.⁸⁶ They also claimed that the prohibition against physician-assisted suicide violates the Equal Protection Clause,⁸⁷ alleging that the law treats terminally ill patients differently from terminally ill patients on life support.⁸⁸ They claimed the law denies terminally ill patients the freedom to choose to hasten death, while terminally ill patients dependant on lifesaving medical treatment are able to withdraw from the life-sustaining treatment.⁸⁹

On September 16, 1994, the plaintiffs moved for a preliminary injunction in the District Court of the Southern District of New York to enjoin then-Attorney General Koppell and "all persons acting in concert and participation with him from enforcing New York Penal Law sections 125.15(3) and 120.30 against physicians who prescribe medications which mentally competent, terminally ill patients may use to hasten their impending deaths."⁹⁰ The plaintiffs also submitted declarations⁹¹ describing the suffering each plaintiff-patient had endured due to his or her illness.⁹² In addition, all three plaintiffs requested the provision of drugs to hasten their deaths.⁹³

⁸⁶ Brief for Petitioner at 3, *Vacco v. Quill*, 117 S. Ct. 2293 (1997) (No. 95-1858). For the text of the Due Process Clause of the Fourteenth Amendment, see *supra* note 30.

⁸⁷ See *supra* note 30.

⁸⁸ *Quill*, 80 F.3d at 719.

⁸⁹ *Id.*

⁹⁰ *Id.* at 719-20.

⁹¹ For a full description of the declarations, see Brief for Respondent at 5, *Vacco v. Quill*, 117 S. Ct. 2293 (1997) (No. 95-1858).

⁹² *Quill*, 80 F.3d at 719. Ms. Doe explained in her declaration that she had a large cancerous tumor that was wrapped around the right carotid artery in her neck, causing her esophagus to collapse and making it difficult for her to swallow. *Id.* at 720. As a result of her condition, doctors had to insert a feeding tube into her stomach which also caused serious problems. *Id.* Mr. Kingsley suffered from AIDS-related cryptosporidiosis, cytomegalovirus retinitis, and toxoplasmosis. *Id.* Mr. Kingsley's illness required him to self-administer medication through a Hickman tube connected to an artery in his chest, a treatment which prevented him from conducting simple routine functions such as taking a shower. *Id.* Mr. Barth submitted a declaration describing how his AIDS-related diseases caused severe diarrhea, fevers, vomiting, and abdominal pain. *Id.*

⁹³ *Id.* at 720. Each of the plaintiffs articulated his or her desire for drugs. *Id.* For instance, Ms. Doe stated, "I want to have drugs available for the purpose of hastening my death in a humane and certain manner." *Id.* Mr. Kingsley stated, "It is my desire that my physician prescribe suitable drugs for me to consume for the purpose of hastening my death when and if my suffering becomes intolerable." *Id.* Similarly, Mr. Barth explained, "I understand that there are no cures. . . . I can no longer endure

In the affidavits, the physician-plaintiffs alleged that in their profession, they encountered "mentally competent, terminally ill patients who request assistance in the voluntary self-termination of life."⁹⁴ The doctors explained that these patients experience severe pain and seek to hasten their own deaths because of the chronic suffering.⁹⁵ However, the physicians stated, they are prohibited under New York law from exercising their professional judgment and administering the requested drugs.⁹⁶

On October 11, 1994, Attorney General Koppell filed a cross-motion for judgment on the pleadings.⁹⁷ Thereafter, the plaintiffs submitted a supplemental declaration from Dr. Quill, in which he described the actions a doctor takes when a patient refuses life-sustaining medical treatment.⁹⁸ Dr. Quill then pointed out the irony of distinguishing withdrawal of lifesaving treatment from physician-assisted suicide: "Unfortunately, some dying patients who are in agony that can no longer be relieved, yet are not dependent on life-sustaining treatment, have no such options under current legal restrictions."⁹⁹

On December 16, 1994, the district court denied the plaintiffs' motion for a preliminary injunction and granted the defendants' cross motion to dismiss the action.¹⁰⁰ First, addressing the due process issue, the court held that physician-assisted suicide is not a fundamental right¹⁰¹ protected by the Constitution.¹⁰² The court also held that the criminalization of physician-

the pain and suffering . . . and I want to have drugs available for the purpose of hastening my death." *Id.* at 721.

⁹⁴ *Id.* at 719.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* Attorney General Koppell filed this cross-motion so that the court could make a decision based upon the pleadings filed. Koppell's goal was to end the case at this point.

⁹⁸ *Id.* at 721.

⁹⁹ *Id.* Dr. Jack Froom also submitted a declaration in which he claimed that physicians are able to ascertain when a patient's request to hasten death is rational. *Id.*

¹⁰⁰ *Quill v. Koppell*, 870 F. Supp. 78 (S.D.N.Y. 1994). Chief Judge Griesa treated the cross-motion as one for summary judgment "since the court has considered matters outside the pleadings—i.e., declarations filed on the motion for preliminary injunction." *Id.* at 79.

¹⁰¹ See *supra* note 61 and accompanying text.

¹⁰² *Quill*, 870 F. Supp. at 82-84. The Court explained that the plaintiffs made "no attempt to argue that physician-assisted suicide, even in the case of terminally ill patients, has any historic recognition as a legal right." *Id.* at 83.

assisted suicide is not a violation of the Equal Protection Clause of the Constitution.¹⁰³

On appeal, the Second Circuit affirmed the portion of the district court's opinion that found no substantive due process right to assisted suicide.¹⁰⁴ However, the court noted that the Supreme Court is reluctant to expand fundamental rights that are not supported by the text of the Constitution.¹⁰⁵ In light of that reluctance, the court determined that the right to die with assistance is neither rooted in our nation's history nor implicit in the concept of "ordered liberty."¹⁰⁶ As such, the right to assisted suicide is not a fundamental right.¹⁰⁷

Having determined that no due process violation was at issue, the Second Circuit addressed whether the ban offends the Equal Protection Clause.¹⁰⁸ According to the court, physician-assisted suicide is no different than the withdrawal of life-sustaining medical treatment.¹⁰⁹ However, the court noted that New York accords different treatment to those who wish to hasten death through self-administered drugs than it does to those who wish to do so by removing life-support systems.¹¹⁰ Furthermore, these distinctions do not justify any purpose in "prolong-

¹⁰³ *Id.* at 85. The court indicated that the state has a valid interest in prohibiting physician-assisted suicide:

It is hardly unreasonable or irrational for the State to recognize a difference between allowing nature to take its course, even in the most severe situations, and intentionally using an artificial death-producing device. The State has obvious legitimate interests in preserving life, and in protecting vulnerable persons. The State has the further right to determine how these crucial interests are to be treated when the issue is posed as to whether a physician can assist a patient in committing suicide.

Id. at 84-85.

¹⁰⁴ *Quill*, 80 F.3d at 723. The court explained that a right is accorded heightened judicial protection only if it is "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." *Id.*

¹⁰⁵ *Id.* at 724.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 725.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 729.

¹¹⁰ *Id.* The court noted:

It seems clear that New York does not treat similarly circumstanced persons alike: those in the final stages of terminal illness who are on life-support systems are allowed to hasten their deaths by directing the removal of such systems; but those who are similarly situated, except for the previous attachment of life-sustaining equipment, are not allowed to hasten death by self-administering prescribed drugs.

Id.

ing a life that is all but ended."¹¹¹ Accordingly, the court concluded that there is no rational basis for the statute's prohibition against terminally ill persons obtaining assistance in hastening their death with self-administered drugs.¹¹²

The Supreme Court of the United States granted certiorari¹¹³ to determine whether New York Penal Law §§ 125.15(3) and 120.30, prohibiting assisted suicide, violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

IV. SUMMARY OF THE COURT'S OPINION

A. MAJORITY OPINION

In a unanimous opinion authored by Chief Justice Rehnquist,¹¹⁴ the Supreme Court reversed the decision of the Second Circuit, holding that the New York statutes prohibiting physician-assisted suicide do not violate the Equal Protection Clause of the Fourteenth Amendment.¹¹⁵

As a threshold matter, the Court addressed the appropriate standard of review.¹¹⁶ Since New York's statutes outlawing assisted suicide do not involve a fundamental right or target a suspect class, the laws would be upheld as long as they are rationally related to some legitimate end.¹¹⁷ Chief Justice

¹¹¹ *Id.* The court remarked:

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

Id. at 730.

¹¹² *Id.* at 731. Judge Calabresi wrote a concurring opinion in which he agreed with the court that the New York statutes are unconstitutional. *Id.* (Calabresi, J., concurring). However, Calabresi felt that the penal provisions should be sent back to the New York State Legislature on constitutional remand so that the legislature clearly could express the interests of the state should the state want to re-enact the statutes. *Id.* (Calabresi, J., concurring).

¹¹³ *Vacco v. Quill*, 117 S. Ct. 36 (1996).

¹¹⁴ Justices O'Connor, Scalia, Kennedy, and Thomas joined in Chief Justice Rehnquist's opinion.

¹¹⁵ *Vacco v. Quill*, 117 S. Ct. 2293 (1997). See also *supra* note 30.

¹¹⁶ *Quill*, 117 S. Ct. at 2297.

¹¹⁷ *Id.* (citing *Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996)).

Rehnquist further noted that under the rational basis standard, there is a strong presumption that the laws are valid.¹¹⁸

The Court then addressed whether New York law treats equally all people who are terminally ill.¹¹⁹ The Court found that “neither New York’s ban on assisting suicide, nor its statutes permitting patients to refuse medical care treat anyone differently from anyone else or draw any distinctions between persons.”¹²⁰ According to Chief Justice Rehnquist, “everyone, regardless of physical condition, is entitled, if competent, to refuse unwanted lifesaving medical treatment; *no one* is permitted to assist a suicide.”¹²¹ Since the laws apply evenhandedly to all people, reasoned Chief Justice Rehnquist, they comply with the requirements of equal protection.¹²²

Furthermore, the Court noted, discontinuation of life-sustaining treatment is not equivalent to physician-assisted suicide.¹²³ The Second Circuit, said Chief Justice Rehnquist, incorrectly determined that refusing lifesaving treatment and assisted suicide are the same.¹²⁴ As a result, the Second Circuit wrongly concluded that all terminally ill people are not treated equally under New York law.¹²⁵

According to the Chief Justice, there is a clear difference between letting a patient die and making that patient die; that distinction is based on principles of causation and intent.¹²⁶ First, when a patient ends life-sustaining medical care, he dies from natural causes.¹²⁷ By contrast, when a patient consumes “lethal medication prescribed by a physician, he is killed by that medication.”¹²⁸ Second, a physician who withdraws life-sustaining medical treatment intends “only to respect his patient’s wishes and ‘to cease doing useless and futile or degrading things to the patient when [the patient] no longer stands to

¹¹⁸ *Id.* (citing *Heller v. Doe*, 509 U.S. 312, 319 (1993)).

¹¹⁹ *Id.* at 2297-98.

¹²⁰ *Id.*

¹²¹ *Id.* at 2298.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* (“[t]he distinction comports with fundamental legal principles of causation and intent.”).

¹²⁷ *Id.*

¹²⁸ *Id.*

benefit from them."¹²⁹ A doctor who assists a suicide, on the other hand, intends that the patient die.¹³⁰ Third, a patient who requests a physician to aid in his suicide clearly intends to end his life, while a patient who refuses or withdraws from life-sustaining treatment might not.¹³¹

In support of this point, the Chief Justice noted that many courts have differentiated refusing life-sustaining treatment from suicide.¹³² In addition, the majority of state legislatures have adopted this principle by drawing a clear line between *letting* a patient die and *making* that patient die: "even as the States move to protect and promote patients' dignity at the end of life, they remain opposed to physician-assisted suicide."¹³³

According to Chief Justice Rehnquist, the Supreme Court implicitly recognized the distinction between the refusal of life-saving medical treatment and assisted suicide in *Cruzan v. Director, Missouri Department of Health*.¹³⁴ In *Cruzan*, Chief Justice Rehnquist explained, the Court concluded that a competent person has a liberty interest in refusing unwanted medical treatment.¹³⁵ That interest is based not on a "general and abstract right to hasten death,"¹³⁶ but on "well established, traditional rights to bodily integrity and freedom from unwanted touching."¹³⁷ Thus, concluded Chief Justice Rehnquist, *Cruzan* provides no support for the notion that the refusal or removal of lifesaving medical treatment and assisted suicide are equivalent.¹³⁸

The Court next articulated New York's five valid interests in this distinction: "(1) prohibiting intentional killing and preserving life; (2) preventing suicide; (3) maintaining physicians' role

¹²⁹ *Id.* (quoting from *Assisted Suicide in the United States: Hearings Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong., 368 (1996) (testimony of Dr. Leon R. Kass)).

¹³⁰ *Id.* at 2299.

¹³¹ *Id.*

¹³² *Id.* (citing *People v. Kevorkian*, 527 N.W.2d 714, 728 (Mich. 1994); *In re Quinlan*, 355 A.2d 647, 665, 670 & n.9 (N.J. 1976); *Fosmire v. Nicoleau*, 551 N.E.2d 77, 82 n.2 (N.Y. 1990)).

¹³³ *Id.* at 2300-01.

¹³⁴ *Id.* at 2301 (citing *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 278 (1990)).

¹³⁵ *Id.* (citing *Cruzan*, 497 U.S. at 279).

¹³⁶ *Id.* (quoting *Quill v. Vacco*, 80 F.3d 716, 727-28 (2d Cir.1996)).

¹³⁷ *Id.* (citing *Cruzan*, 497 U.S. at 278-79 (O'Connor, J., concurring)).

¹³⁸ *Id.*

as their patients' healers; (4) protecting vulnerable people from indifference, prejudice, and psychological and financial pressure to end their lives; and (5) avoiding a possible slide towards euthanasia."¹³⁹ Concluding that these "public interests easily satisfy the constitutional requirement that a legislative classification bear a rational relation to some legitimate end," the Court held that the New York prohibition on physician-assisted suicide does not violate the Equal Protection Clause of the Fourteenth Amendment.¹⁴⁰

B. JUSTICE SOUTER'S CONCURRENCE

In his concurrence, Justice Souter agreed that assisted suicide currently is not a fundamental right.¹⁴¹ He wrote separately, however, to emphasize that assisted suicide is an important interest that demands careful scrutiny by the state.¹⁴² Specifically, he articulated three arguments in support of the right to assisted suicide. First, historically, society has not sanctioned assisted suicide.¹⁴³ Second, the state's interest in bodily autonomy, which has been recognized in the abortion context, may also be applied in the context of physician-assisted suicide.¹⁴⁴ Lastly, an individual is entitled to a physician's assistance in dying when death is imminent.¹⁴⁵ Notwithstanding these points, Justice Souter ultimately concluded that the state's interest in preserving life defeats any claim in favor of physician-assisted suicide.¹⁴⁶ In particular, Justice Souter gave significant weight to the state's interest in protecting patients from making hasty decisions to end their lives.¹⁴⁷ He was also concerned about preventing euthanasia.¹⁴⁸

¹³⁹ *Id.* at 2302.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* (Souter, J., concurring). Justice Souter's concurrence regarding the Equal Protection Clause was discussed in Quill's companion case, *Washington v. Glucksberg*, 117 S. Ct. 2258, 2275 (1997).

¹⁴² *Glucksberg*, 117 S. Ct. at 2290 (Souter, J., concurring).

¹⁴³ *Id.* at 2289 (Souter, J., concurring).

¹⁴⁴ *Id.* at 2289-90 (Souter, J., concurring).

¹⁴⁵ *Id.* at 2290 (Souter, J., concurring).

¹⁴⁶ *Id.* (Souter, J., concurring).

¹⁴⁷ *Id.* (Souter, J., concurring).

¹⁴⁸ *Id.* (Souter, J., concurring). Specifically, Justice Souter feared that: Voluntary and involuntary euthanasia may result once doctors are authorized to prescribe lethal medication in the first instance, for they might find it pointless to distinguish between patients who administer their own fatal drugs and those

Finally, Justice Souter determined that the legislature is in the best position to address the respondents' claim because a legislature has the best opportunity to obtain the facts to resolve this controversy.¹⁴⁹ As such, Justice Souter said, although physician-assisted suicide is not a fundamental right at this time, it is an important interest that should be addressed by the legislature.¹⁵⁰

C. JUSTICE O'CONNOR'S CONCURRENCE

Justice O'Connor concurred with the Court's conclusion that "there is no generalized right to commit suicide."¹⁵¹ Justice O'Connor wrote separately, however, to suggest that there is no need for the Court to address the narrower issue of whether a terminally ill patient has a constitutional right to control his or her death.¹⁵² Because terminally ill patients can receive medication to alleviate their pain, Justice O'Connor reasoned, the state interests are sufficient to justify a ban against physician-assisted suicide.¹⁵³

Justice O'Connor was confident that the democratic process would adequately balance the interests of the terminally ill, who wish to hasten their death, with the state's interests in preventing those individuals from ending their lives mistakenly or under pressure.¹⁵⁴ For Justice O'Connor, the "difficulty in defining terminal illness and the risk that a dying patient's request for assistance in ending his or her life might not be truly voluntary justifies the prohibitions on assisted suicide."¹⁵⁵

who wish not to, and their compassion for those who suffer may obscure the distinction between those who ask for death and those who may be unable to request it.

Id. (Souter, J., concurring).

¹⁴⁹ *Id.* at 2293 (Souter, J., concurring).

¹⁵⁰ *Id.* (Souter, J., concurring).

¹⁵¹ *Vacco v. Quill*, 117 S. Ct. 2293, 2303 (1997) (O'Connor, J., concurring) (internal quotation marks omitted). Justices Ginsburg and Breyer joined in Justice O'Connor's opinion.

¹⁵² *Id.* (O'Connor, J., concurring).

¹⁵³ *Id.* (O'Connor, J., concurring).

¹⁵⁴ *Id.* (O'Connor, J., concurring). Justice O'Connor indicated that the states are taking great effort to handle the issue: "[T]he task of crafting appropriate procedures for safeguarding . . . liberty interests is entrusted to the 'laboratory' of the States . . . in the first instance." *Id.* (O'Connor, J., concurring) (quoting *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring)).

¹⁵⁵ *Id.* (O'Connor, J., concurring).

D. JUSTICE STEVENS' CONCURRENCE

Justice Stevens reiterated the majority view that there is no absolute constitutional right to assisted suicide,¹⁵⁶ acknowledging, however, that there are situations in which an interest in hastening death is legitimate.¹⁵⁷ Justice Stevens cited *Cruzan*¹⁵⁸ as an example of such a situation.¹⁵⁹ Although *Cruzan* is not directly on point, Justice Stevens explained, it does raise issues of personal autonomy and the right to decide how to die.¹⁶⁰ According to Justice Stevens, *Cruzan* makes it clear that an individual may have a constitutionally protected interest in choosing to die that outweighs the state's interest in preserving life.¹⁶¹

Justice Stevens reasoned that the state interests in prohibiting physician-assisted suicide are not equally strong in all cases.¹⁶² The "unqualified interest in the preservation of human life,"¹⁶³ Justice Stevens argued, should not always outweigh the will of a patient who wishes to hasten her death because of pain and suffering.¹⁶⁴ Next, Justice Stevens remarked that the state's interests in "preventing suicide, protecting the vulnerable from coercion and abuse, and preventing euthanasia are less significant in this context."¹⁶⁵ Justice Stevens indicated that the state's interest in preventing abuse is irrelevant when a patient makes a rational and voluntary decision.¹⁶⁶ In addition, although Justice Stevens acknowledged the state's interest in preventing depressed people from resorting to suicide, he noted that experts can work with terminally ill patients to help them cope with depression in assessing their options.¹⁶⁷ Finally, Justice Stevens

¹⁵⁶ *Id.* at 2307 (Stevens, J., concurring).

¹⁵⁷ *Id.* at 2305 (Stevens, J., concurring).

¹⁵⁸ See *supra* notes 23-43 and accompanying text.

¹⁵⁹ *Quill*, 117 S. Ct. at 2305-06 (Stevens, J., concurring) (citing *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990)).

¹⁶⁰ *Id.* at 2307 (Stevens, J., concurring).

¹⁶¹ *Id.* (Stevens, J., concurring).

¹⁶² *Id.* (Stevens, J., concurring).

¹⁶³ *Id.* at 2307-08 (Stevens, J., concurring).

¹⁶⁴ *Id.* (Stevens, J., concurring). Justice Stevens stated:

Although as a general matter the State's interest in the contributions each person may make to society outweighs the person's interest in ending her life, this interest does not have the same force for a terminally ill patient faced not with the choice of whether to live, only of how to die.

Id. at 2308 (Stevens, J., concurring).

¹⁶⁵ *Id.* (Stevens, J., concurring).

¹⁶⁶ *Id.* (Stevens, J., concurring).

¹⁶⁷ *Id.* (Stevens, J., concurring).

criticized the state's argument about preserving the integrity of the medical profession.¹⁶⁸ For physicians who develop a relationship with a patient, who understand that patient's needs, and who have given that patient advice on treatment, assisting in that patient's suicide does not harm the physician-patient relationship.¹⁶⁹

In closing, Justice Stevens agreed with the majority that there is a distinction between the refusal of lifesaving medical treatment and assisted suicide.¹⁷⁰ However, unlike the majority, he questioned whether this was a distinction without significance.¹⁷¹ He stated that there may be little distinction between the intent of a patient who wishes to remove his life-support and one who requests the assistance of a physician in ending her life: "[I]n both situations, the patient is seeking to hasten a certain, impending death."¹⁷² Furthermore, in both circumstances, the doctor "may seek simply to ease the patient's suffering and to comply with her wishes."¹⁷³ Thus, Justice Stevens concluded, the outcome of a particular case must necessarily depend on the specific facts of that case.¹⁷⁴

E. JUSTICE BREYER'S CONCURRENCE

Justice Breyer agreed with the majority that there is a distinction to be drawn between physician-assisted suicide and withdrawal of lifesaving medical treatment.¹⁷⁵ However, Justice Breyer disagreed with the Court's characterization of the plaintiffs' claimed liberty interest as a "right to commit suicide with another's assistance."¹⁷⁶ Breyer offered what he thought to be a more appropriate and historically supported formulation, the "right to die with dignity."¹⁷⁷ Irrespective of the words used to describe the claimed right, Justice Breyer felt that the Court

¹⁶⁸ *Id.* at 2308-09 (Stevens, J., concurring). This interest focuses on preserving the traditional healing role of the doctor. *Id.* (Stevens, J., concurring).

¹⁶⁹ *Id.* at 2309 (Stevens, J., concurring).

¹⁷⁰ *Id.* at 2309-10 (Stevens, J., concurring).

¹⁷¹ *Id.* at 2310 (Stevens, J., concurring).

¹⁷² *Id.* (Stevens, J., concurring).

¹⁷³ *Id.* (Stevens, J., concurring).

¹⁷⁴ *Id.* (Stevens, J., concurring).

¹⁷⁵ *Id.* at 2311 (Breyer, J., concurring). Justice Breyer also agreed with Justice O'Connor's separate opinion, except insofar as it joined the majority's opinion.

¹⁷⁶ *Id.* (Breyer, J., concurring) (citing *id.* at 2269).

¹⁷⁷ *Id.* (Breyer, J., concurring).

need not and should not decide whether such a right is “fundamental.”¹⁷⁸ That determination is not essential because the current laws do not force a terminally ill person to suffer from severe pain.¹⁷⁹ The laws permit doctors to prescribe drugs to ameliorate their patients’ pain.¹⁸⁰ According to Justice Breyer, since doctors can provide patients with these pain killers, “the laws of New York and Washington would overcome any remaining significant interests and would be justified.”¹⁸¹

V. ANALYSIS

The Supreme Court in *Vacco v. Quill* held that two New York statutes prohibiting physician-assisted suicide do not violate the Equal Protection Clause of the Fourteenth Amendment. Part A of this section argues that the Supreme Court improperly determined that physician-assisted suicide is not a fundamental right. The right to die with assistance is a fundamental right that is deeply rooted in our nation’s history and is implicit in the concept of ordered liberty. Part B of this section argues that the Court erred by distinguishing between the withdrawal of lifesaving medical treatment and physician-assisted suicide. The Court should have determined on the basis of intent and causation that the two acts are the same. Part C explores the asserted state interests in banning assisted-suicide and suggests that they do not outweigh the interest of the terminally ill person in controlling his own death. Finally, this Note discusses the implications of the Court’s decision, specifically the likelihood that physician-assisted suicide will continue underground and that hospice care will improve as a result of the ban.

A. PHYSICIAN-ASSISTED SUICIDE IS A FUNDAMENTAL RIGHT

The Supreme Court was wrong when it ruled in *Quill* that the right to die with assistance is not fundamental.¹⁸² In determining whether a particular right is protected by the Due Process Clause, the Court analyzed two factors: (1) whether the asserted right is deeply rooted in this nation’s history and tradi-

¹⁷⁸ *Id.* (Breyer, J., concurring).

¹⁷⁹ *Id.* (Breyer, J., concurring).

¹⁸⁰ *Id.* (Breyer, J., concurring).

¹⁸¹ *Id.* (Breyer, J., concurring).

¹⁸² The Court’s reasoning is discussed in *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997). See *supra* text accompanying notes 62-79.

tion;¹⁸³ and (2) whether the asserted right is implicit in the concept of ordered liberty.¹⁸⁴ Using either line of inquiry, the Court should have determined that the right to die with assistance involves a liberty interest protected by the Due Process Clause of the Fourteenth Amendment.¹⁸⁵

First, the right of a terminally ill person to hasten an inevitable death has been a part of this nation's history. The tradition traces back to Greek philosophers.¹⁸⁶ For instance, Plato once commented, "If any man labour of an incurable disease, he may dispatch himself, if it be to his good."¹⁸⁷ Moreover, the Stoics of Rome acknowledged suicide as a logical choice for terminally ill individuals who had no hope for a sustained future.¹⁸⁸

Neither the Old nor New Testament bans suicide.¹⁸⁹ None of the four suicides mentioned in the Old Testament (Samson, Saul, Abimelech and Achitophel) is denounced.¹⁹⁰ In fact, the early Christians regarded death as a way into heaven: "the more powerfully the Church instilled in believers the idea that this world was a vale of tears and sin and temptation, where they waited uneasily until death released them into eternal glory, the more irresistible the temptation to suicide became."¹⁹¹

Although the Church later regarded suicide as a crime, a number of its adherents acknowledged the right of terminally ill

¹⁸³ See *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937).

¹⁸⁴ See *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

¹⁸⁵ See *supra* note 30 for the text of the Due Process Clause.

¹⁸⁶ See Patricia A. Unz, Note, *Euthanasia: A Constitutionally Protected Peaceful Death*, 37 N.Y.L. SCH. L. REV. 439, 441-42 (1992).

¹⁸⁷ PLATO, *THE REPUBLIC OF PLATO BOOK III*, 406A-409 (Alan Bloom ed., 1968). In determining other liberty interests, the Court has given weight to the tradition of the Greeks. See *Roe v. Wade*, 410 U.S. 113, 130-32 (1973).

¹⁸⁸ Unz, *supra* note 186, at 441-42. Seneca, the great Roman orator, stated:

I will not relinquish old age if it leaves my better part intact. But if it begins to shake my mind, if it destroys its faculties one by one, if it leaves me not life but breath, I will depart from the putrid or tottering edifice . . . if I must suffer without hope of relief, I will depart, not through fear of the pain itself, but because it prevents all for which I would live.

SHERWIN B. NULAND, *HOW WE DIE* 151 (1993) (quoting Seneca).

¹⁸⁹ See Alfred Alvarez, *The Background*, in M. PABST BATTIN & DAVID J. MAYO, *SUICIDE: THE PHILOSOPHICAL ISSUES* 12 (1980).

¹⁹⁰ *Id.*

¹⁹¹ Thomas J. Marzen et al., *Suicide: A Constitutional Right?*, 24 DUQ. L. REV. 1, 25 (1985).

individuals to commit suicide.¹⁹² As Sir Thomas Moore indicated, a terminally ill person should be able to commit suicide so as to “despatch [sic] himself out of that painful life, as out of a prison.”¹⁹³

During the late 1800s, assisted suicide was a crime, but it was never punished.¹⁹⁴ In fact, there is no evidence that any court ever imposed punishment for suicide or attempted suicide under common law in post-revolutionary America.¹⁹⁵ By the time the Fourteenth Amendment was adopted in 1868, suicide was generally not punishable, and in only nine of the thirty-seven states is it clear that there were statutes prohibiting assisting suicide.¹⁹⁶

Today, even though most states criminalize assisted suicide,¹⁹⁷ there is no reported case of a physician receiving a criminal penalty for aiding in a patient’s suicide.¹⁹⁸ This persistent reluctance of juries to convict illustrates society’s belief that there is no right to force the terminally ill to continue suffering, and no right to convict those who aid the terminally ill in ending their pain and suffering. Overall, it is evident that the right to assisted suicide is grounded in our nation’s history and tradition.

The right to die with assistance is also a liberty interest protected by the Fourteenth Amendment.¹⁹⁹ In a number of cases, the Court has upheld the constitutionally protected right of self-determination and personal autonomy.²⁰⁰ More specifically, *Cruzan v. Director, Missouri Department of Health*²⁰¹ and *Planned*

¹⁹² See Alvarez, *supra* note 189, at 25-28.

¹⁹³ See O. RUTH RUSSELL, FREEDOM TO DIE 55-56 (1975).

¹⁹⁴ Catherine D. Shaffer, Note, *Criminal Liability for Assisting Suicide*, 86 COLUM. L. REV. 348, 350 (1986).

¹⁹⁵ *Id.*

¹⁹⁶ See Marzen et al., *supra* note 191, at 76.

¹⁹⁷ *Physician-Assisted Suicide*, *supra* note 10, at 2031 n.8.

¹⁹⁸ T. Howard Stone & William J. Winslade, *Physician-Assisted Suicide and Euthanasia in the United States*, 16 J. LEGAL MED. 481, 492 (1995).

¹⁹⁹ *Physician-Assisted Suicide*, *supra* note 10, at 2025-26.

²⁰⁰ The Court has invoked the liberty interest to protect a woman’s right to abortion, *Roe v. Wade*, 410 U.S. 113 (1973); to protect the rights of unmarried individuals to have access to contraceptives, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to protect personal decisions concerning marriage, *Loving v. Virginia*, 388 U.S. 1 (1967); to protect married persons’ right to have access to contraceptives, *Griswold v. Connecticut*, 381 U.S. 479 (1965); and to protect the right to procreate, *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

²⁰¹ 497 U.S. 261 (1990).

*Parenthood v. Casey*²⁰² demonstrate that this liberty interest includes the right of terminally ill patients to hasten death in a peaceful manner.

The desire of a terminally ill patient to control the end of his or her life should be a personal decision. The Court in *Cruzan* espoused this interest, stating, "The choice between life and death is a deeply personal decision of obvious and overwhelming finality."²⁰³ Moreover, in its holding in *Cruzan*, the Court noted that "[T]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions."²⁰⁴

The Court in *Casey* further expressed this right to protect an individual's freedom to decide the course of his or her life. As the Court eloquently stated:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.²⁰⁵

Although *Casey* concerned a woman's right to abortion, the Court's reasoning is relevant to the case considered in this Note.²⁰⁶ Just as a woman who is confronted with an unwanted pregnancy, a terminally ill patient encounters "suffering [that] is too intimate and personal for the State to insist, without

²⁰² 505 U.S. 833 (1992).

²⁰³ *Cruzan*, 497 U.S. at 281. In his dissent, Justice Brennan commented, "Dying is personal. And it is profound. For many, the thought of an ignoble end, steeped in decay, is abhorrent. A quiet, proud death, bodily integrity intact, is a matter of extreme consequence." *Id.* at 310-11 (Brennan, J., dissenting). Justice Stevens, in his dissent, stated, "Choices about death touch the core of liberty. Our duty, and the concomitant freedom, to come to terms with the conditions of our own mortality are undoubtedly 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* at 343 (Stevens, J., dissenting).

Thus, it is evident that *Cruzan* is not just a case about the right to terminate lifesaving medical treatment, but is really a case concerning self-determination, personal autonomy, and the right to control the time and manner of one's death.

²⁰⁴ *Id.* at 278.

²⁰⁵ *Casey*, 505 U.S. at 851.

²⁰⁶ For example, the district court in *Glucksberg* stated, "Like the decision of whether or not to have an abortion," the decision how and when to die is one of "the most intimate and person choices a person may make in a lifetime," a choice "central to personal dignity and autonomy." *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1459 (W.D. Wash. 1994).

more, upon its own vision . . . however dominant that vision has been in the course of our history and our culture."²⁰⁷

In addition to the Supreme Court, other courts have also recognized this right. The *Quinlan* court acknowledged the importance of personal decision-making in ruling that parents had a right to remove their daughter from lifesaving treatment.²⁰⁸ This liberty interest was likewise acknowledged in *Lee v. Oregon* when that court commented: "it may be a valid public policy to allow choice based on principles of autonomy and self-determination."²⁰⁹

In sum, courts have recognized the right to self-determination and personal autonomy in a number of contexts. Like the rights at issue in these other circumstances, the right of a terminally ill person to determine the time, place, and manner of his or her death is clearly a decision of personal dignity and autonomy. Accordingly, the Court should have determined that the right to physician-assisted suicide is protected by the Due Process Clause of the Fourteenth Amendment.

The Supreme Court has likewise recognized a liberty interest involving bodily integrity.²¹⁰ On numerous occasions, the Court has indicated that a person has the right to control the course of his or her own medical treatment.²¹¹ Most recently, the Court in *Cruzan* stated that "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment."²¹² Justice O'Connor, in her concurrence in *Cruzan*, commented that "our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination."²¹³ Implicit in these statements is the idea that a terminally ill person has a liberty interest in determining the course of his or her medical treatment. This interest is so fundamental that it should be applicable even when one wishes to hasten death. Accordingly, this component of liberty should ex-

²⁰⁷ *Casey*, 505 U.S. at 852.

²⁰⁸ *In re Quinlan*, 355 A.2d 647 (1976). See *supra* text accompanying notes 14-22

²⁰⁹ 891 F. Supp. 1429, 1434 (D. Or. 1995). See *supra* text accompanying notes 50-58.

²¹⁰ See *Washington v. Harper*, 494 U.S. 210 (1990); *Winston v. Lee*, 470 U.S. 753 (1985); *Schmerber v. California*, 384 U.S. 757 (1966).

²¹¹ See cases cited *supra* note 210.

²¹² *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 278 (1990).

²¹³ *Id.* at 287 (O'Connor, J., concurring).

tend to the instant case since the plaintiffs, as in *Cruzan*, had an interest in quickening their death.

Overall, an analysis of the history of assisted suicide as well as case law demonstrates that the Due Process Clause of the Constitution protects the right of a terminally ill patient to end his suffering by hastening death with the assistance of a physician.

B. WITHDRAWAL OF LIFESAVING MEDICAL TREATMENT AND PHYSICIAN-ASSISTED SUICIDE ARE THE SAME

In *Quill*, the Supreme Court incorrectly concluded that physician-assisted suicide and the termination of lifesaving medical treatment are different in nature.²¹⁴ In making this determination, the Court relied on legal principles of causation and intent.²¹⁵ First, the Court attempted to distinguish assisted suicide from the termination of lifesaving medical treatment by contending that, in the latter case, the doctor takes no affirmative action that causes the patient's death.²¹⁶ But, the Supreme Court itself has recognized that this is not so.²¹⁷ In *Cruzan*, the Court indicated that when a person dies from the termination of lifesaving treatment, that death is the result of hydration and nutrition being withdrawn and not from natural causes.²¹⁸ Thus, neither physician-assisted suicide nor the withdrawal of lifesaving medical treatment results in a "natural" death; rather, in both situations, the physician provides the medical assistance to meet the patient's desire to end his or her suffering.²¹⁹

²¹⁴ *Vacco v. Quill*, 117 S. Ct. 2293, 2298 (1997).

²¹⁵ *Id.*

²¹⁶ *Id.* ("when a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology; but if a patient ingests lethal medication prescribed by a physician, he is killed by that medication.")

²¹⁷ *Cruzan*, 497 U.S. at 280.

²¹⁸ *Id.* The Second Circuit made a similar argument in *Quill v. Vacco*: "Indeed, there is nothing 'natural' about causing death by means other than the original illness or its complications. The withdrawal of nutrition brings on death by starvation, the withdrawal of hydration brings on death by dehydration, and the withdrawal of ventilation brings about respiratory failure." 80 F.3d 716, 729 (2d Cir. 1996).

²¹⁹ The withdrawal of lifesaving equipment requires the physician to take a number of actions: (1) turn off the respirator; (2) disconnect the machine from the tube that goes to the patient's lungs; (3) remove the tube from the patient's lung; (4) administer morphine or barbiturates to ease the patient's sense of suffocation; and (5) monitor medical levels to ensure that symptoms of severe air hunger do not arise. See *Quill Supplemental Decl.* at 5, *Vacco v. Quill*, 117 S. Ct. 2293 (1997) (No. 95-1858).

Similarly flawed is the Court's argument that a patient requesting cessation of lifesaving treatment may not intend to die.²²⁰ Many terminally ill patients suffer so much from their illness that they ask to discontinue medical treatment in the hope of dying.²²¹ Like those on life-sustaining medical equipment, these patients seek to hasten death "because the quality of life during the time remaining . . . ha[s] been terribly diminished," and their lives have "been physically destroyed and its quality, dignity, and purpose gone."²²² In addition, stating that the patient does not intend suicide since he only wants a natural death assumes that the termination of life-sustaining treatment does not cause a patient's death.²²³ That is not the case.²²⁴

In sum, the Supreme Court's distinction between terminating medical treatment and assisting a patient's suicide is unconvincing. In both situations, the patient is making a decision to hasten death in order to prevent further suffering. As Justice Scalia noted in *Cruzan*, a terminally ill patient who asks to terminate lifesaving treatment, like one who wishes to hasten death through the self-administration of drugs, makes a "conscious decision to pu[t] an end to his own existence."²²⁵

C. THE STATE HAS NO LEGITIMATE INTEREST IN PROHIBITING PHYSICIAN-ASSISTED SUICIDE

The Equal Protection Clause requires that a legislative mandate be rationally related to some legitimate end.²²⁶ In *Vacco v. Quill*, the Court acknowledged five "legitimate" interests as justification for banning physician-assisted suicide.²²⁷ However, none of these interests justifies an absolute ban on physician-assisted suicide: none outweighs the right of a competent, terminally ill individual to decide to end his or her suffering.

First, the Court's statements regarding the state's interest in preserving life²²⁸ fail to recognize that such an interest varies,

²²⁰ *Quill*, 117 S. Ct. at 2299.

²²¹ See *Satz v. Perlmutter*, 362 So. 2d 160, 162-63 (Fla. Dist. Ct. App. 1978).

²²² See *Bouvia v. Superior Court*, 225 Cal. Rptr. 297, 304-05 (Cal. Ct. App. 1986).

²²³ *Physician-Assisted Suicide*, *supra* note 10, at 2030.

²²⁴ See *supra* notes 216-19 and accompanying text.

²²⁵ See *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 296-97 (1990) (Scalia, J., concurring) (internal quotation and citation omitted).

²²⁶ *Vacco v. Quill*, 117 S. Ct. 2293, 2302 (1997).

²²⁷ *Id.* See *supra* note 139 and accompanying text for a description of the interests.

²²⁸ *Quill*, 117 S. Ct. at 2302.

depending on the stage and quality of life. In fact, the state's interest in preserving life weakens as the individual approaches death.²²⁹ For instance, the *Quinlan* court concluded that a state's interest in preserving life "weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims."²³⁰ Moreover, the Court in *Cruzan* reasoned that the state's interest is "greatest when an affliction [is] curable" and less so when "the issue is not whether, but when, for how long, and at what cost to the individual [a] life may be briefly extended."²³¹ The Court weighed the state's interest in preserving life against the constitutionally protected interests of the patient and concluded that the latter's interest was stronger.²³² Similarly, the Court in *Quill* should have recognized that the individual's interest in ending his or her suffering outweighs any state interest in preserving life.

Likewise, preventing suicide²³³ is not a legitimate reason for prohibiting physician-assisted suicide. A state can assume that a person who is not terminally ill will enjoy many years of future life. Accordingly, it is justifiable for a state to prevent suicide in order to protect the individual from making a rash decision. Conversely, a patient suffering from terminal illness has little expectation of a quality future life. Hence, the state's interest in preventing suicide is significantly reduced. In fact, by preventing a terminally ill patient from hastening death, the court forces the person to continue suffering from intense pain and physical deterioration. Preventing suicide is therefore an illegitimate reason for prohibiting physician-assisted suicide.

The third interest, maintaining physicians' role as their patients' healers,²³⁴ also does not justify a ban on physician-assisted suicide. As the Second Circuit correctly stated, "the writing of a

²²⁹ See *Cruzan*, 497 U.S. at 271; *In re Quinlan*, 355 A.2d 647, 664 (N.J. 1976).

²³⁰ *Quinlan*, 355 A.2d at 664.

²³¹ *Cruzan*, 497 U.S. at 271 (quoting Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417, 426 (Mass. 1977)). In *Cruzan*, Justice Brennan indicated that "the State has no legitimate general interest in someone's life, completely abstracted from the interest of the person living that life, that could outweigh the person's choice to avoid medical treatment." *Id.* at 313 (Brennan, J., dissenting). Justice Stevens also found the state's abstract interest in the preservation of life to be an inadequate basis for overriding patient choice. See *id.* at 331 (Stevens, J., dissenting).

²³² *Id.* at 281-84.

²³³ *Quill*, 117 S. Ct. at 2302.

²³⁴ *Id.*

prescription to hasten death . . . involves a far less active role for the physician than is required in bringing about death through” the withdrawal of lifesaving medical treatment.²³⁵ In addition, the Ninth Circuit in *Compassion in Dying* ruled, “[g]iven the similarity between what doctors are now permitted to do and what the plaintiffs assert they should be permitted to do, we see no risk at all to the integrity of the profession.”²³⁶ Indeed, opinion polls also indicate that the majority of doctors advocate aiding terminally ill patients in hastening death.²³⁷ Thus, allowing physician-assisted suicide would not erode the physicians’ role as their patients’ healers.

Fourth, the risk that “vulnerable people” will be exposed to “indifference, prejudice, and psychological and financial pressure to end their lives”²³⁸ is just as great when a patient seeks to terminate lifesaving treatment as when a patient seeks self-administering drugs to hasten death. Family members and physicians are confronted with the same incentives whether the patient seeks withdrawal from life-sustaining medical treatment or assistance from a doctor in ending his life by other means.²³⁹

Finally, the state interest in preventing a possible slide towards euthanasia²⁴⁰ is irrelevant. Currently, competent terminally ill patients have the right to end lifesaving medical treatment.²⁴¹ Thus, the state’s interest in banning physician-assisted suicide in order to prevent a slide towards euthanasia, conduct which is already legal, is invalid. Moreover, this sort of slippery-slope argument may be made in opposition to any con-

²³⁵ *Quill v. Vacco*, 80 F.3d 716, 729 (2d Cir. 1996).

²³⁶ *Compassion in Dying v. Washington*, 79 F.3d 790, 828 (9th Cir. 1996), *rev’d sub nom.* *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997). Justice Stevens also addressed this interest and stated that for physicians who have developed a relationship with their patients, assisting in a suicide would not harm that relationship. See *Quill*, 117 S. Ct. at 2309.

²³⁷ Researchers polled 938 physicians in the State of Washington and found that 54% supported physician-assisted suicide under certain circumstances. Jonathan S. Cohen et al., *Attitudes Toward Assisted Suicide and Euthanasia Among Physicians in Washington State*, 331 NEW ENG. J. MED. 89 (1994). Jerald Bachman found that 54% of doctors polled in Michigan supported legislation legalizing physician-assisted suicide for terminally ill individuals. Jerald G. Bachman, *Assisted Suicide and Euthanasia in Michigan*, 331 NEW ENG. J. MED. 812 (1994).

²³⁸ *Quill*, 117 S. Ct. at 2302.

²³⁹ Amicus Curiae of State Legislature in Support of Respondents Michael Dorf and Sherry Colb at 21, *Vacco v. Quill*, 117 S. Ct. 2293 (1997) (No. 95-1858).

²⁴⁰ *Quill*, 117 S. Ct. at 2302.

²⁴¹ See *supra* note 22 and accompanying text.

stitutional right. Indeed, this interest has nothing to do with the right of competent, terminally ill patients to voluntarily hasten death.

D. RAMIFICATIONS OF THE COURT'S DECISION

There are at least two results likely to stem from the Supreme Court's holding in *Quill*. First, even though the Supreme Court found that a terminally ill patient does not have a constitutionally protected right to die with assistance,²⁴² covert assisted suicide will continue. Even before *Vacco v. Quill*, assisted suicide was already criminalized throughout the United States.²⁴³ Nonetheless, there was a "violation of [the] legal prohibitions and a secret, underground practice" of physician-assisted suicide.²⁴⁴ Many doctors are sympathetic to the suffering of the terminally ill. In fact, it is possible that there will be substantial defiance of the laws banning assisted suicide, rendering the "statutes prohibiting assisted suicide merely symbolic, essentially defended as a form of state propaganda of one moralistic view, rather than a realistic regulation of behavior."²⁴⁵

Second, although this Note has criticized the Supreme Court's reasoning, the Court's decision may have a positive impact on the health care system, including more widespread use of hospice care and the advancement of palliative medicine. As the American Medical Association indicated, "the prohibition on physician-assisted suicide provides health care professionals with an incentive to improve and expand the availability of palliative care."²⁴⁶ Developments in palliative medicine are significant since they would help to alleviate patients' fears of painful

²⁴² See *supra* note 140 and accompanying text.

²⁴³ See *supra* note 49 and accompanying text.

²⁴⁴ Daniel Callahan & Margot White, *The Legalization of Physician-Assisted Suicide: Creating a Regulatory Potemkin Village*, 30 U. RICH. L. REV. 1, 4 (1996). In fact, a study conducted in Washington illustrates the use of covert assisted suicide. See Anthony L. Back et al., *Physician-Assisted Suicide and Euthanasia in Washington State: Patient Requests and Physician Responses*, 275 JAMA 919, 920 (1996). In the study, 1,443 doctors were asked whether any of their patients had requested them to assist in a suicide. *Id.* Of the 828 doctors responding, 218 had received such requests. *Id.* at 920-21. Forty-three doctors assisted their patients. *Id.*

²⁴⁵ Brief of the Coalition of Hospice Professionals as Amicus Curiae for Affirmance of the Judgments Below at 17, *Vacco v. Quill*, 117 S. Ct. 2293 (1997) (No. 95-1858).

²⁴⁶ See Brief of the American Medical Association et al. as Amici Curiae in Support of Petitioners at 6-8, *Vacco v. Quill*, 117 S. Ct. 2293 (1997) (95-1858).

death.²⁴⁷ Furthermore, criminalizing assisted suicide may force an increase in the number and availability of hospices to serve the needs of the terminally ill.²⁴⁸

VI. CONCLUSION

In *Vacco v. Quill*, the Supreme Court incorrectly held that two New York statutes prohibiting physician-assisted suicide did not violate the Equal Protection Clause of the Fourteenth Amendment. The right to die with assistance is a fundamental right, since it is part of this nation's history and is implicit in the concept of ordered liberty. Furthermore, the Court erred in differentiating between physician-assisted suicide and the withdrawal of lifesaving medical treatment. Finally, the Court should have concluded that the state has no legitimate interest in banning physician-assisted suicide. As a result of this decision, all terminally ill patients have lost their constitutionally guaranteed right to die with assistance.

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²⁴⁷ Patients often request assistance in committing suicide out of fear that their pain will become intolerable. See *id.* at 6-10. In addition, the decision of a physician to engage in assisted suicide usually occurs after efforts to alleviate the patient's pain have failed. See Herbert Hendin, *Seduced by Death: Doctors, Patients, and the Dutch Care*, 10 ISSUES IN L. & MED. 123 (1994). By improving palliative medicine, both physicians and patients may be less inclined to consider suicide. *Id.*

²⁴⁸ During oral argument, the Court noted that the Netherlands has a total of three palliative care facilities for its terminally ill. On the other hand, England, which prohibits physician-assisted suicide, has 185. See Official Transcript Proceedings Before The Supreme Court of the United States at 51-52, *Vacco v. Quill*, 117 S. Ct. 2293 (1997) (No. 95-1858).