Notre Dame Journal of Law, Ethics & Public Policy

Volume 12
Issue 2 *Symposium on the Beginning and End of Life*

Article 1

1-1-2012

Physician Assisted Suicide: A Constitutional Crisis Resolved

John H. Robinson

FOREWORD

PHYSICIAN ASSISTED SUICIDE: A CONSTITUTIONAL CRISIS RESOLVED

JOHN H. ROBINSON*

My thesis here is that no decision of the United States Supreme Court during the past quarter century is as important as its decision in *Washington v. Glucksberg*.[1] In that decision the Supreme Court succeeded, contentiously and temporarily, in limiting the harm that can be done to federalism and to democracy by way of a substantive reading of the Due Process Clause of the Fourteenth Amendment to the Constitution.[2] I believe that at the outset of an issue of the *Notre Dame Journal of Law, Ethics & Public Policy* that is devoted to questions related to the beginning and end of life, we should pause to consider both the importance of this accomplishment and its fragility.

For just over a century now, American constitutional law has been bedeviled by judicial readings of the Due Process Clause of the Fourteenth Amendment that make that clause something more than a guarantee of the sort of procedure that ought to be employed to determine whether or not a particular person should be deprived of his or her life, liberty, or property by way of governmental action. Once upon a truly dreadful time, that

* Associate Professor of Law, University of Notre Dame. The litigation history that appears on pages 8-11 of this foreword also appeared in a foreword that I wrote for an earlier symposium. *See* John H. Robinson, *Physician Assisted Suicide: Its Challenge to the Prevailing Constitutional Paradigm*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 345, 355-58 (1995).

1. 117 S. Ct. 2258 (1997).

2. One provision of the Fourteenth Amendment says that no state "shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. Almost identical language appears in the Fifth Amendment. *See* U.S. CONST. amend. V. The provisions of that amendment considered solely as such, limit only the power of the federal government. *See* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833). While the Due Process Clause of the Fifth Amendment is susceptible to a substantive reading, *see, e.g.*, Adair v. United States, 208 U.S. 161 (1908), my focus here is on substantive readings of the Due Process Clause of the Fourteenth Amendment.

sort of reading of the Due Process Clause entailed the judicial invalidation of state efforts to regulate labor relations.[3] For the past sixty years and more, that entailment has been abandoned, but for the past thirty-eight years, the federal courts have been grappling with substantive readings of the Due Process Clause that address a liberty vastly more intimate than the freedom to sell one's labor for less than a living wage or for more hours than one's health can stand. That liberty is, of course, freedom from intrusive governmental regulation of sexual relations. The Justices who presided over the revival of substantive due process adjudication were all keenly aware of its earlier and cataclysmic career as a monitor of labor-relations laws, and they took pains to protect it from a similar fate in its second career. Back in 1961, when the second Justice Harlan first announced the revival of this approach to constitutional adjudication, he was careful to specify just how it was to be implemented. Substantive due process adjudication, he said, requires the courts to strike a balance between "postulates of respect for the liberty of the individual" and "the demands of organized society."[4] That balance, in turn, is to be struck with an eye to "to the traditions from which [this country] developed as well as the traditions from which it broke."[5] Substantive due process adjudication, as Justice Harlan envisioned it, would, therefore, pursue a conservative agenda, invalidating only those laws that strayed too far from those traditions. Decisions predicated upon abuse of the substantive due process prerogative "could not long survive,"[6] Justice Harlan said, while those that were built on the living tradition that he had in mind were, as he put it, "likely to be sound."[7]

Two things need to be said about Justice Harlan's attempted resurrection of substantive due process: first, that it failed to win over his brethren on the Supreme Court; and second, that when, after his demise, the Court did accept substantive due process thinking, it accepted a markedly less conservative version of it.

---

3. *See, e.g.*, Coppage v. Kansas, 236 U.S. 1 (1915) (invalidating a Kansas law prohibiting the use of "yellow-dog contracts," or contracts where an employee agreed not to join a union while employed); Lochner v. New York, 198 U.S. 45 (1905) (invalidating a New York statute prescribing the maximum hours allowed to be worked by bakers); Allgeyer v. Louisiana, 165 U.S. 578 (1897) (invalidating a Louisiana statute prohibiting state citizens from dealing with marine insurance companies that had not fully complied with Louisiana law).

4. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

5. *Id.*

6. *Id.*

7. *Id.*

By the time the Court decided *Roe v. Wade*[8] in 1973, Harlan's use of substantive due process adjudication to rein in legislative deviations from our tradition of respect for individual liberty had given way to a vastly more venturesome use of it. As an analytic matter, this was achieved by complementing Justice Harlan's tradition test with one that asked if a particular practice was "implicit in the concept of ordered liberty."[9] If it was, then it was entitled to protection from intrusive state legislation. As the assisted suicide cases will reveal, this "ordered liberty" test sets the judiciary free, in ways the tradition test does not, to invalidate legislation that interferes with those practices that members of the judicial elite value highly, even when no constitutional text warrants that invalidation. Pursuant to this latter day account of substantive due process, the federal judiciary, lead by the Supreme Court, was to assume a leadership role in liberating the states from those limitations on human freedom that judicial discernment finds to be outmoded or arbitrary.

That the federal judiciary should lead the struggle for freedom and that legislatures should be sources of oppression may perhaps have made sense at a time when the federal judiciary had just spent a generation liberating blacks from the oppressive laws passed by the legislatures of the southern states, but it would surely have seemed odd to an earlier generation that had seen the federal judiciary frustrate legislative efforts to guarantee working men and women decent working conditions and a living wage. Whether or not the judiciary is progressive or retrogressive—and whether or not our own judgments on that issue turn out to be correct—substantive due process adjudication, more than any other sort of adjudication, puts both the federal judiciary and the democratic process at risk in two extremely troublesome ways. First, substantive due process adjudication imperils the legitimacy of the judiciary by inviting what may be called conscientious defiance of its commands.[10] Where a court can point to a particular constitutional text as a warrant for its orders, and where it can summon up generations of case law that bear upon that text in support of its orders, there the possibility of conscientious defiance is limited. But where a court has nothing but the sparse language of the Due Process Clause to give as a warrant for its commands, and where no other currently effective clause

8. 410 U.S. 113 (1973).

9. The phrase comes from Justice Cardozo's opinion in *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

10. For evidence that some think that this invitation ought to be accepted in the current era, see generally Symposium, *The End of Democracy? The Judicial Usurpation of Politics*, FIRST THINGS, Nov. 1996.

of the Constitution has nearly so checkered a history as the Due Process Clause, there the conscientious citizen who believes that the judiciary has taken sides in a partisan political struggle is sorely tempted to resent its intrusion into the political process and to hold its commands in contempt. This is not good for either the judiciary or the political process.

The second way in which substantive due process adjudication puts both the judiciary and the democratic process at risk is by its tendency to trivialize the legislative process by arrogating to itself the last word on hotly contested issues. When this happens legislators, and the people whom they represent, are made to look infantile and inept, able perhaps to allocate funds for bridges and highways, but unable to resolve any question of any great significance. Worse yet, judges are made to look wise, as if with their robes they also put on a kind of wisdom that allows them to resolve all of the really hard questions for us. As Thayer[11] and Frankfurter,[12] not to mention Holmes[13] and Brandeis,[14] knew, judges do not put on any such wisdom with their robes and legislators need not be as inept as the judiciary sometimes thinks, and in any case this entire picture makes a mockery of the democratic process.

What we need, then, is a form of substantive due process adjudication in which this tendency to trivialize the legislature and to convince the judiciary of its superior wisdom is kept to a minimum. What we have gotten from our judiciary in recent years has not quite filled that bill, and it is fairly easy to explain

---

11. *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1883). For a symposium on Thayer's work in this area, see Symposium, *One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 NW. U. L. REV. 1 (1993).

12. *See* H.N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 128-137 (1981). *See also* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 646-71 (1943) (Frankfurter, J., dissenting) and Minersville School Dist. v. Gobitis, 310 U.S. 586, 600 (1940) ("To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people.").

13. *See* David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449 (1994). See also Justice Holmes' dissents in *Tyson & Brother–United Theatre Ticket Offices, Inc. v. Banton*, 273 U.S. 418, 445-47 (1927) and *Adkins v. Children's Hospital*, 261 U.S. 525, 567-71 (1923).

14. *See, e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262, 285 (1932) (Brandeis, J., dissenting) ("The legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no grounds for judicial interference.").

why that should be. Whenever the appropriateness of substantive due process adjudication is an issue in an actual case, there is always a second, equally pressing issue before the court in question. That issue is, of course, the putative right whose violation has given rise to the litigation in the first place. That issue—birth control, abortion, gay rights, suicide—is certain to engage our minds and to fire our passions, and we can forgive ourselves for being more intent upon having that issue resolved as we believe it should be than we are upon the vastly drier issue of who should resolve it. It is, however, that drier issue that is raised when the propriety of substantive due process adjudication is discussed.

In *Bowers v. Hardwick*,[15] for example, Justice Blackmun, in dissent, wrote a moving plea for including gay rights within the ambit of *Griswold* and its progeny.[16] Were it clear that substantive due process adjudication of the sort employed in *Roe v. Wade* is appropriate in a government constituted as ours is, Blackmun's dissent may well have deserved to carry the day. When, on the other hand, Justice White attempted in the opinion of the Court to distinguish gay sex from straight sexual intimacies, his effort was half-hearted and his results were unpersuasive.[17] When, however, he addressed the legitimacy of the entire enterprise of substantive due process adjudication, there he made claims that Justice Blackmun left unaddressed. After dismissing the case for the inclusion of gay sex among those intimacies that, by virtue of the Due Process Clause, merit judicial protection from intrusive legislation as "at best, facetious," Justice White goes on to say:

> Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the

15. 478 U.S. 186 (1986).

16. *See id.* at 199-214 (Blackmun, J., dissenting); *see also* Griswold v. Connecticut, 381 U.S. 479 (1965) (invalidating a state law that criminalized the use of contraceptives even by married persons in their marital relations); Eisenstadt v. Baird, 405 U.S. 438 (1972) (invalidating a state law that prohibited the distribution of contraceptives to unmarried persons); Roe v. Wade, 410 U.S. 113 (1973) (invalidating state laws that prohibited abortion except for the purpose of saving the pregnant woman's life).

17. *See Bowers*, 478 U.S. at 190-191.

> Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.[18]

When *Roe v. Wade* was challenged in *Planned Parenthood v. Casey*,[19] the survivors of the *Bowers* majority found themselves in dissent, and there they repeated the concerns about legitimacy that Justice White had expressed in *Bowers*. The *Casey* majority, successors to the normative commitments of the *Bowers* dissent, this time had a response to Justice White's legitimacy concerns. Likening the opposition that *Roe* has engendered to that sparked by *Brown v. Board of Education*,[20] and likening its refusal to reverse *Roe* to the Court's earlier refusal to retreat from *Brown*, the *Casey* majority said that legitimacy concerns require courts to stand by hotly contested outcomes until the court in question receives "the most convincing justification"[21] for rejecting them.

In two respects, the majority's attempt in Casey to analogize *Roe* to *Brown* falls short. Consider first the rhetorical effect of analogizing *Roe* to *Brown*, in particular the probability that the analogy will lead critics of *Roe* to see it as really very much like *Brown* and for that reason to have been correctly decided. Some people, to be sure, have long seen *Roe* as just like *Brown* inasmuch as the right to have an abortion free from restrictive state regulation liberates women in their private and business lives just as *Brown* liberated African-Americans from second class status in their business and political lives. Others, however, have seen *Roe* as the polar opposite to *Brown* and as like the hated *Dred Scott* decision of one hundred forty years ago inasmuch as both *Roe* and *Dred Scott* said of a class of human beings that they are not persons, consigning previable fetuses to death and antebellum blacks to slavery.[22] When the Court analogizes *Roe* to *Brown* it takes sides in the intense political dispute over abortion, thereby depriving its effort at legitimizing its *Roe* jurisprudence of the rhetorical effect for which the Court was hoping.

---

18. *Id.* at 194-95.

19. 505 U.S. 833 (1992).

20. 347 U.S. 483 (1954).

21. *Casey*, 505 U.S. at 836.

22. The conflict between the two understandings of abortion alluded to here is nicely sketched in KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD (1984).

As an analytic matter, for the *Casey* Court's analogy of *Roe* to *Brown* to succeed as part of an overall effort to legitimize *Roe* itself and expansive substantive due process adjudication generally, the points of analogy between *Roe* and *Brown* would have to outweigh the points of disanalogy. To say that because both decisions were in their own day controversial is perhaps to suggest one point of analogy, but then *Dred Scott* was controversial in its day[23] as were the earlier substantive due process decisions in theirs.[24] Why then analogize *Roe* to *Brown* and not to *Dred Scott*? A consideration of what is missing from the *Roe* jurisprudence that was demonstrably present in the *Brown* jurisprudence suggests how difficult it would be for the *Casey* majority to answer that question. What was missing from the *Casey* Court's effort to legitimize *Roe* by analogy to *Brown* was any attention to the presence of an explicit textual warrant for *Brown*[25] and its absence in the case of *Roe*, any attention to the presence of a compelling moral critique of racism[26] and the countervailing difficulty of articulating such a critique of laws making abortion illegal, any attention to the breakdown of the legislative process with regard to racist state legislation in the fifties and the absence of a similar breakdown with respect to abortion law reform in the seventies, or any attention to the political consensus on the evils of segregation that had taken shape outside of the South in the post-war years and the absence of a similar consensus on the abortion question at the time that *Roe* was decided. What the *Casey* majority left unaddressed, in other words, was the legitimacy of substantive due process adjudication itself.

As a result, when the American judiciary took up the issue of assisted suicide, it had to work from a schizoid account of substantive due process adjudication: that form of adjudication was simultaneously a constitutionally compelled attempt "to define

---

23. Abraham Lincoln, for one, repeatedly attacked the Dred Scott decision. See, for example, his Speech at Springfield, Illinois, of June 26, 1857, in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 398 (Roy P. Basler et al. eds., 1953). See also his First Debate with Stephen A. Douglas at Ottawa, Illinois, on Aug. 21, 1858, in 3 *id.* at 1, and his First Inaugural Address, on Mar. 4, 1861, in 4 *id.* at 262.

24. The *locus classicus* for the rejection of the early substantive due process decisions is Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909). *See also* Learned Hand, *Due Process of Law and the Eight Hour Day*, 21 HARV. L. REV. 495 (1908).

25. "[No state shall] deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, §1.

26. *See* GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (20th anniv. ed. 1962).

the freedom guaranteed by the Constitution's own promise"[27] and a prudentially forbidden exercise in judicial delegitimation. A quick survey of three cases that preceded the Supreme Court's own attempt to put both assisted suicide and substantive due process in their proper constitutional place will reveal the consequences of that schizoid status and lay the groundwork for the Court's resolution of it.

In December of 1993, Richard C. Kaufman, a trial court judge in Michigan, determined that the constitutional law of decisional privacy includes, in some circumstances at least, a right to commit suicide.[28] Predictably, Judge Kaufman reached his conclusion by asking himself if suicide has either the historical or the conceptual warrant required by decisional privacy law.[29] Finding the historical inquiry to produce a "murky" result,[30] he turned to the conceptual issue—viz.—"whether the right to commit suicide is ever part of the implicit concept of ordered liberty."[31] In this inquiry, the good judge was guided by the assertion of the plurality in the then-recent *Casey* decision to the effect that "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life" lies at the heart of the liberty that the Fourteenth Amendment protects against intrusive governmental regulation.[32] Using this assertion as his guide, Judge Kaufman was easily able to conclude that suicide decisions deserve to be added to sexual decisions as among the sorts of decisions implicated in this concept of ordered liberty.[33] All that was left for him to do was to decide that, in some cases at least, the state's countervailing interest in proscribing suicide fail to trump a particular person's right to die,[34] and the trial judge was free to invalidate Michigan's prohibition on assisted suicide, at least as that prohibition applied to the case then before his court.[35] For our later purposes, it is important to note how much adjudicative freedom Judge Kaufman found in the "ordered liberty" half of the sub-

27. Planned Parenthood v. Casey, 505 U.S. 833, 901 (1992).

28. *See* People v. Kevorkian, No. 93-11482, 1993 WL 603212 (Mich. Cir. Ct. Dec. 13, 1993), *rev'd. sub nom.* Hobbins v. Attorney General, 518 N.W.2d 487 (Mich. Ct. App. 1994), *aff'd in part, rev'd. in part sub nom.* People v. Kevorkian, 527 N.W.2d 714 (Mich. 1994), *cert. denied*, 514 U.S. 1082 (1995).

29. *See Kevorkian*, 1993 WL 603212, at *8.

30. *See id.* at *13.

31. *Id.*

32. *Id.* (quoting *Casey*, 505 U.S. at 851).

33. *See id.* at *18.

34. *See id.* at *19.

35. *See id.* at *20.

stantive due process test. We will return to that theme when we discuss *Compassion in Dying* a paragraph or two hence.

One year later, the Michigan Supreme Court reversed the decision that I have just sketched.[36] Speaking for a majority of his court on this point, Justice Cavanagh found the historical inquiry mandated by the decisional privacy cases to be far from murky. He found instead a long and clear history of societal and legal disapproval of suicide, a history that includes the criminalization of assisted suicide by sixty percent of the states that ratified the Fourteenth Amendment.[37] As for the claim that a right to suicide is implicit in the concept of ordered liberty, Justice Cavanagh argued both that the argument for that claim was internally incoherent and that by proving too much it proved nothing at all.[38] The incoherence, Justice Cavanagh thought, lay in the conflict between the dignitarian presuppositions of all autonomy-based claims and the violation of human dignity implicit in any effort to measure the value of a person's life by reference to the current state of that person's mind or body.[39] The tendency of the argument to prove too much, and therefore to prove nothing, stems from its linkage of a suicide right to autonomy; if the argument works, Justice Cavanagh thought, then every autonomous person would have a rebuttable right to suicide, but this, he thought, is a conclusion that even the advocates of a suicide right are at pains to reject.[40] Justice Cavanagh dismissed as unpersuasive the efforts of the dissenters to employ a balancing test to determine the class of persons whose interest in a painless and prompt death outweighs the countervailing interests that ordinarily militate in favor of a prohibition on one person's giving another assistance in dying.[41]

While this constitutional drama was being played out in Michigan, a parallel phenomenon was occurring on the West Coast. In May of 1994, Barbara Rothstein, the Chief Judge of the United States District Court for the Western District of Washington, in deciding *Compassion in Dying v. Washington*,[42] found in the Due Process Clause, as it has been interpreted by the decisional privacy cases, a constitutional right whereby "adults who are mentally competent, terminally ill, and acting under no undue influence" are entitled "to voluntarily hasten their death by taking a

36. *See* People v. Kevorkian, 527 N.W.2d 714 (Mich. 1994).
37. *See id.* at 730-33.
38. *See id.* at 727 n. 41.
39. *See id.*
40. *See id.*
41. *See id.* at 727 n.37.
42. 850 F. Supp. 1454 (W.D. Wash. 1994).

lethal dose of physician-prescribed medicine."[43] As had Judge Kaufman in Michigan five months earlier, Judge Rothstein predicated this finding on the *Casey* majority's claim that "the right to define one's own concept or existence, or meaning, of the universe, and of the mystery of human life" lies at the heart of the liberty that the Fourteenth Amendment protects from intrusive governmental regulation.[44] By way of this understanding of the scope of the Due Process Clause, Judge Rothstein was able to analogize suicide decisions to abortion decisions inasmuch as each involves "the most intimate and personal choices a person may make in a lifetime."[45] With that much done, all Judge Rothstein had to do was to deny the constitutional significance of the distinction between the termination of life-sustaining medical treatment and the prescription of a lethal dose of medication, and she was free to declare Washington's law against assisted suicide unconstitutional.[46]

By further analogy to the Michigan litigation, when a three judge panel of the Ninth Circuit heard the appeal from Judge Rothstein's decision, that panel reversed her decision.[47] There Judge John Noonan, speaking for the two-to-one majority, rejected Judge Rothstein's attempt to use the "mystery of human life" quote from the *Casey* plurality as a bridge between the constitutional regulation of abortion laws and the constitutional regulation of assisted suicide laws. As had the Michigan Supreme Court, the panel majority found any effort to base a suicide right in a more general autonomy claim to prove too much, and hence to prove nothing. As Judge Noonan said:

> If at the heart of the liberty protected by the Fourteenth Amendment is this uncurtailable ability to believe and to act on one's deepest beliefs about life, the right to suicide and the right to assistance in suicide are the prerogative of at least every sane adult. The attempt to restrict such rights to the terminally ill is illusory. If such liberty exists in this context, as Casey asserted in the context of reproductive rights, every man and woman in the United States must enjoy it. . . . The conclusion is a reductio ad absurdum.[48]

The panel also rejected as out of hand Judge Rothstein's efforts to deny the constitutional significance of the distinction

43. *Id.* at 1456.
44. *Id.* at 1459 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).
45. *Id.* at 1462.
46. *See id.* at 1467.
47. *See* Compassion in Dying v. Washington, 49 F.3d 586 (9th Cir. 1995).
48. *Id.* at 591.

between refusing life support and seeking medical help in dying.[49] Having done this, the panel majority found it easy to conclude that neither the language of the Constitution nor the history of its interpretation entail a constitutional right of the sort that Judge Rothstein had so confidently asserted ten months earlier.[50]

Judge Noonan's panel decision suffered much the same fate in the hands of the Ninth Circuit banc that reviewed it as Judge Rothstein's decision had in his hands. In a decision written by Judge Stephen Reinhardt, the banc rejected the panel's decision and affirmed the district court at least insofar as that court had based its invalidation of Washington's prohibition of assisted suicide on due process grounds.[51] Finding that "the essence of the substantive component of the Due Process Clause is to limit the ability of the state to intrude into the most important matters of our lives, at least without substantial justification,"[52] and finding that the decisions about the time and manner of one's death is one of those matters, Judge Reinhardt had no difficulty concluding that "the constitution encompasses a due process liberty interest in controlling the time and manner of one's death—that there is, in short, a constitutionally recognized 'right to die.'"[53] When he considered the state's countervailing interests in prohibiting assisted suicide, he found that, at least in the case of competent, terminally ill adults, those interests do not have the compelling force that they must have in order to trump a constitutionally protected liberty interest.[54] Presciently, Judge Reinhardt concluded his opinion with the following *envoi*:

> There is one final point we must emphasize. Some argue strongly that decisions regarding matters affecting life or death should not be made by the courts. Essentially, we agree with that proposition. In this case, by permitting the *individual* to exercise the right to *choose* we are following the constitutional mandate to take such decisions out of the hands of the government, both state and federal, and to put them where they rightly belong, in the hands of the people. We are allowing individuals to make the decisions that so profoundly affect their very existence—and precluding the state from intruding excessively into that criti-

49. *See id.* at 593-94.
50. *See id.* at 594.
51. *See* Compassion in Dying v. Washington, 79 F.3d 790, 798 (9th Cir. 1996).
52. *Id.* at 812.
53. *Id.* at 816.
54. *See id.* at 837.

> cal realm. The Constitution and the courts stand as a bulwark between individual freedom and arbitrary and intrusive governmental power. Under our constitutional system, neither the state nor the majority of the people in a state can impose its will upon the individual in a matter so highly "central to personal dignity and autonomy." Those who believe strongly that death must come without physician assistance are free to follow that creed, be they doctors or patients. They are not free, however, to force their views, their religious convictions, or their philosophies on all the other members of a democratic society, and to compel those whose values differ with theirs to die painful, protracted, and agonizing deaths.[55]

There are two features of these final words from Judge Reinhardt that deserve comment here. First, in *Compassion in Dying*, the federal judiciary was asked to decide whether a restrictive (indeed prohibitive) assisted suicide regime must, as a matter of constitutional law, give way to a permissive one. In the passage just quoted Judge Reinhardt makes it look as if he is neutral between the two, allowing both regimes to flourish depending upon the beliefs of the individuals involved in a particular case. Furthermore, he makes this apparent neutrality appear to be required of him by the Constitution. In reality, of course, Judge Reinhardt was not at all neutral between restrictiveness and permissiveness. He was really saying that the Constitution requires Washington to adopt a permissive regime, and the only way he was able to make that claim was by giving the "ordered liberty" component of substantive due process analysis as expansive a reading as the mystery passage in *Casey* appeared to allow. Second, Judge Reinhardt ends his opinion with a reference to the "painful, protracted, and agonizing deaths" that a restrictive assisted suicide regime allegedly imposes on some individuals. He makes it look as if opponents of assisted suicide are indifferent to those deaths. In reality, of course, no decent person is indifferent to the pain and agony of others. Opponents of assisted suicide are free to be vigorous advocates of aggressive palliative care for the terminally ill, as most of them are. Opponents of assisted suicide also worry about the kinds of death that some individuals may endure under a permissive assisted suicide regime.[56] Perhaps for every protracted death that a restrictive

55. *Id.* at 839.

56. *See, e.g.*, Ezekiel J. Emanuel, *The Future of Euthanasia and Physician-Assisted Suicide: Beyond Rights Talk to Informed Public Policy*, 82 MINN. L. REV. 983 (1998).

regime produces there would be several more miserable ends-of-life under a permissive regime. Whether or not this is true is a significant aspect of the assisted suicide debate now being conducted in the legislatures of several states. For Judge Reinhardt to make it look otherwise is either to be disingenuous in the extreme or to be guilty of a flagrant *ignoratio elenchi.*

Meanwhile, and a continent away, another case was making its way through the toils of the judicial process. In that case Doctor Timothy Quill, a physician known for his role in assisting one of his patients to die, and two other doctors and their patients had gone to federal court in New York seeking to have that state's criminalization of assisting in a suicide declared unconstitutional. After failing in the district court, they succeeded in the Second Circuit.[57] That court, prompted by the hostility to expansive substantive due process adjudication that the Supreme Court had exhibited in *Bowers v. Hardwick*,[58] rejected the substantive due process rationale used by the Ninth Circuit in the case just described,[59] relying instead on a equal protection rationale.[60] What the Second Circuit did was to divide terminally ill New Yorkers into two cohorts: one cohort was composed of all those terminally ill New Yorkers who depend for their continued existence upon life-support systems of one sort or another; the other cohort was composed of terminally ill New Yorkers who are not so dependent. Of the first cohort one can say that under state and federal law they can end their life at any time simply by ordering the removal of the life-support system in question.[61] Of the second cohort one can say that they do not have similar access to death.[62] If, however, the Second Circuit reasoned, those terminally ill New Yorkers in the second cohort could have lethal doses of medication prescribed for them, then they would be roughly equal to those of their fellow citizens who are in the first cohort.[63] The Second Circuit, after trashing the distinction between killing and letting die, found there to be no rational relationship between the inequality just noted and a legitimate state interest.[64] For that reason, the Second Circuit found New York's statutes that criminalize assisting in a suicide to be uncon-

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

58. 478 U.S. 186 (1986). *See supra* text at notes 15-18 for a discussion on this matter.

59. *See Vacco,* 80 F.3d at 724.

60. *See id.* at 725-731.

61. *See id.* at 727-729.

62. *See id.* at 729.

63. *See id.* at 729-731.

64. *See id.*

stitutional at least insofar as it kept physicians from prescribing lethal doses of medication to competent, terminally ill persons in the final stages of their illness.[65]

In the fall of 1996, the Supreme Court granted certiorari in both *Glucksberg*[66] and *Quill*,[67] and in June of 1997 it reversed both decisions. To *Quill* the Court gave the back of its hand.[68] It found the distinction between assisting suicide and withdrawing life-sustaining treatment to be eminently rational and deeply rooted in the American legal system.[69] The Court also took the attending physician's intent in the two scenarios seriously[70] and upheld New York's laws that keep physicians from prescribing medication when they know that the medication will be used by the patient to bring about his or her death.[71] It was, however, the Supreme Court's decision in *Glucksberg*[72] that was the more important of the two, and it is to that case that I now turn.

All nine of the Justices who participated in *Glucksberg* concurred in the result: viz., that laws prohibiting assistance in suicides are not facially unconstitutional, at least insofar as those laws are relevantly similar to the prohibitions embodied in the laws of New York and Washington.[73] Speaking for a majority, Chief Justice Rehnquist used *Glucksberg* as an occasion for reining in the substantive use of the Due Process Clauses that the Ninth Circuit had read so expansively. He did this by elevating the relatively objective and decidedly conservative "tradition" test of a claim to substantive due process protection over a more subjective and expansive "ordered liberty" test.[74] How the Chief Justice did this merits both a bit of explanation and a bit of evaluation.

With respect to the explanation, scholars of the common law have realized for some time that the level of abstraction at which a line of cases is considered is often crucial to the outcome of a

65. *See id.*

66. *See* Washington v. Glucksberg, 518 U.S. 1057 (1996).

67. *See* Vacco v. Quill, 518 U.S. 1055 (1996).

68. *See* Vacco v. Quill, 117 S. Ct. 2283 (1997).

69. *See id.* at 2298.

70. *See id.*

71. *See id.* at 2302.

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

73. *See id.* Chief Justice Rehnquist wrote the opinion of the Court, in which Justices O'Connor, Scalia, Kennedy, and Thomas joined. Justice O'Connor filed a concurring opinion in which Justices Ginsburg and Breyer joined in part. Justices Stevens, Souter, Ginsburg, and Breyer all filed opinions concurring in the judgment.

74. *See id.* at 2262-2268.

particular case.[75] Generally speaking, the more abstractly a line of cases is considered, the freer the court in question is to make new law under the guise of merely taking the next step in a well-established tradition. Conversely, the more concretely that line is considered, the more constrained the court in question is likely to be with respect to making new law. Much the same is true of constitutional adjudication. In *Bowers*, for example, Justice White was doggedly concrete in his assessment of the *Griswold/Roe* line of cases, finding the case for a step from the constitutional protection of family, marriage, and procreation to a similar protection for homosexual sex deficient.[76] In *Casey*, on the other hand, the majority took the *Roe* line to (and perhaps beyond) the highest possible level of abstraction in its effort to root the constitutional protection of abortion in "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[77] In *Glucksberg*, the Chief Justice, speaking for the majority, insisted upon a concrete consideration of the *Roe* line, requiring a "careful description"[78] of the alleged fundamental right at stake in the case and a close conceptual nexus between it and the allegedly analogous rights that have already been given constitutional protection against intrusive state legislation.[79]

When we ask on what basis the Chief Justice chose between the generous reading of prior cases illustrated by *Casey* and the parsimonious reading illustrated by *Hardwick*, the Chief Justice himself is quite forthcoming. "This approach," he says, referring to the use of concrete examples (as opposed to a more abstract "philosophic exercise") to determine "the outlines of the 'liberty' specially protected by the Fourteenth Amendment, tends to rein in the subjective elements that are necessarily present in due-process judicial review."[80] But a concrete approach to the "ordered liberty" component of substantive due process adjudication inevitably leads to its subordination to the vastly more conservative "tradition" component of it. That became evident in *Hardwick*, and it became evident again in *Glucksberg*, where once the Chief Justice had reported that for the past seven hundred years "our

75. *See* Julius Stone, *The Ratio of the Ratio Decidendi*, 22 MOD. L. REV. 597 (1959). This article and the literature of which it is critical is discussed in MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW (1988).

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

77. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

78. *Glucksberg*, 117 S. Ct. at 2268 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

79. *See id.* at 2268-70.

80. *Id.* at 2268.

laws have consistently condemned . . . assisted suicide,"[81] the case for a constitutional right to assistance in suicide was doomed. At least in the hands of the Chief Justice, then, a concrete approach to "ordered liberty" analysis denies any independent generative capacity to it, and it is precisely that effect that the Chief Justice was out to achieve.

High school students used to learn that they have to realize that Shakespeare's *Julius Caesar* isn't really about Julius Caesar before they can begin to understand the play. Similarly readers of the assisted suicide cases must realize that they aren't really about assisted suicide before they can begin to understand them. Just as Julius Caesar provides the occasion for a study of Brutus in Shakespeare's play, so assisted suicide provides an occasion for a study of the role of the federal judiciary in American political life in *Glucksberg* and, to a lesser extent, in *Quill*. In *Glucksberg* the Chief Justice was able to put together a substantial majority in opposition to the federal judiciary's playing a leadership role in the contemporary debate over how we die. Several of the concurring opinions make it clear, however, that in rejecting a role of that sort, the Court was by no means withdrawing completely from the fray. Were state legislatures to pass laws that threatened with punishment those doctors who prescribe aggressive palliative care for their dying patients, the federal courts, the concurring opinions suggest, would surely step in to invalidate those laws.[82] No one seriously expects laws of that sort to be passed—the legislative trend is in just the opposite direction—but the concurring opinions conjure them up, I suspect, to remind us that the federal courts stand ready to vindicate the fundamental rights of the people from inappropriate legislative restrictions upon them. A proper evaluation of *Glucksberg* must focus on the appropriateness, or not, of the federal courts' playing just this role with respect to the protection of those unenumerated rights for which constitutional protection is sought by way of the Due Process Clause.

To my mind, the best point of departure with respect to an evaluation of the role that *Glucksberg* assigns to the federal judiciary is by looking at our state legislatures, asking if with respect to assisted suicide they are likely to suffer from just those infirmities that for the past sixty years the federal courts have used as justifications for strict scrutiny of their legislative product. At first

81. *Id.* at 2267.

82. *See id.* at 2308-2310 (Stevens, J., concurring in the judgments of *Glucksberg* and *Quill*); *id.* at 2311-12 (Breyer, J., concurring in the judgments of *Glucksberg* and *Quill*).

glance, surely, that does not appear to be the case. Unlike Catholics in Oregon in the twenties,[83] or African-Americans in the South in the fifties,[84] those of us who are likely to die a medicalized death do not lack legislative clout, and no special interest group is waiting to thwart our legislative efforts. In a representative democracy such as we have in the United States, courts should engage in constitutional invalidation of the laws that our representatives make only when those laws offend some express or implied constitutional value, as the case law has illuminated the text of the Constitution, or when there's good reason to suspect that certain legislation is imposing the tyranny of the majority in a way that denies the equal protection of the laws to a group especially in need of that protection, or when a legislature has pathologically encroached upon some extra-constitutional value in a way that we simply cannot defend or abide. *Nos morituri* just aren't that sort of a group and the prohibition upon lethal prescriptions just isn't that sort of encroachment.

To make of our existential angst over how we will die a fundamental right would be to disable our legislatures with respect to a set of questions regarding which they are at least as capable of producing good answers as our courts are. In the end, therefore, *Glucksberg* should be seen as moving us towards the resolution of the crisis in which we found ourselves as the case went up to the Supreme Court. The expansion of substantive due process jurisprudence to every intimate, personal issue has been prevented, and the great questions regarding how dying should be constructed so that we can realize its full human potential has been left to legislative resolution, at least in the first instance. When a particular legislature's resolution of those questions becomes the subject of litigation regarding its constitutionality, the judiciary should proceed with caution, conscious of the limitations upon its authority that the Constitution imposes and of the limitations upon its wisdom that the human condition imposes. That it will do so is, however, open to question. The same Supreme Court that endorsed a restrained approach to substantive due process in *Glucksberg* appears to have retreated from that endorsement in a recent decision.[85] It is, therefore, all the more necessary for the friends of representative democracy to become articulate once again in the language of judicial

83. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925).

84. *See* Brown v. Board of Educ., 347 U.S. 483 (1954).

85. *See* County of Sacramento v. Lewis, 118 S. Ct. 1708 (1998).

restraint. Only when that restraint is observed are the people truly free to govern themselves with respect to the life and death issues to which the articles that follow this foreword are addressed.