THE "RIGHT TO DIE" IS DEAD: A CONSTITUTIONAL ANALYSIS OF PHYSICIAN-ASSISTED SUICIDE

Curt M. Hapward[*]

That a question is important does not imply that it is constitutional. The Founding Fathers did not establish the United States as a democratic republic so that elected officials would decide trivia, while all great questions would be decided by the judiciary.[1]

I. INTRODUCTION

The Fourteenth Amendment of the Constitution does not explicitly grant a person the right to physician-assisted suicide ("PAS"); nor has the United States Supreme Court ruled on the right to PAS.[2] However, within the past year, two federal appellate courts in separate circuits have held laws banning PAS unconstitutional.[3] In upholding PAS,[4] the Ninth and Second

---

[*]This Comment is dedicated to my fiancee, Tara Massey, Coordinator — Seton Hall University School of Law's Health Law & Policy Program.

[1]Compassion in Dying v. Washington, 79 F.3d 790, 858 (9th Cir. 1996) (Kleinfeld, J., dissenting), *stay granted*, Washington v. Glucksberg, 116 S. Ct. 2494 (1996), *cert. granted*, Washington v. Glucksberg, 65 U.S.L.W. 3085 (U.S. Oct. 1, 1996) [hereinafter *Compassion III*].

[2]Many courts and commentators construe a "right to PAS" from the Due Process and/or the Equal Protection Clauses of the Fourteenth Amendment. The Amendment in relevant part states:

> No State shall make or enforce any law which shall abridge the privileges or 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.

[3]*Compassion III*, 79 F.3d at 837-39 (holding that a Washington statute that prohibits physicians from prescribing life-ending medication for terminally ill competent adults violates the Due Process Clause of the Fourteenth Amendment); Quill v. Vacco, 80 F.3d 716, 731 (2d Cir. 1996) (ruling that the Equal Protection Clause allows physicians to prescribe drugs to be self-administered by mentally competent patients who seek to end their lives during the final stages of a terminal illness), *cert. granted*, 64 U.S.L.W. 3795 (U.S. Oct. 1, 1996) [hereinafter *Quill II*].

Circuit Courts of Appeal reached the same result using different constitutional theories.

The Court of Appeals for the Ninth Circuit construed the constitutional doctrine concerning liberty interests (the Due Process Clause) to encompass a right to PAS,[5] while the Court of Appeals for the Second Circuit ruled that a statute prohibiting PAS was unconstitutional because it violated the Equal Protection Clause.[6] The fact that the courts could not agree on which part of the Constitution creates the "right to die" exposes the weaknesses of both arguments. Additionally, each case's procedural history reveals different holdings among the lower courts,[7] displaying that judges are "ruling" on the moral debate rather than the Constitution. This divergence emphasizes the lack of a constitutional basis for this "right to die" and provides further ground for the Supreme Court to reverse both holdings.

Moreover, courts and commentators incorrectly use the expansive term "right to die" in this context; rather, the federal courts have decided, and the Supreme Court will decide, whether there exists any right to PAS. The "right" at issue in these recent cases in the Ninth and Second Circuits and another case, *Lee v. Oregon*,[8] is the right to PAS, not "the right to die."

---

[4]PAS "generally means a doctor intentionally prescribing, but not administering, sufficient drugs to end the life of a mentally competent, terminally ill patient." Richard A. Ryan, *Assisted Suicide: Legislative Decision or Constitutional Right?*, DETROIT NEWS, June 9, 1996, at B5.

[5]*Compassion III*, 79 F.3d at 798-816. For the text of the Due Process Clause, see *supra* note 2.

[6]*Quill II*, 80 F.3d at 731. For the text of the Equal Protection Clause, see *supra* note 2.

[7]Compassion in Dying v. Washington, 850 F. Supp. 1454, 1467 (W.D. Wash. 1994) (holding that the Washington statute violates the Due Process and Equal Protection Clauses of the Constitution), *rev'd*, 49 F.3d 586, 594 (9th Cir. 1995) (ruling that the statute was constitutional), *rev'd en banc*, 79 F.3d 790, 837-39 (9th Cir. 1996) (holding that the Washington statute violated the Due Process Clause), *stay granted*, Washington v. Glucksberg, 116 S. Ct. 2494 (1996), *cert. granted*, Washington v. Glucksberg, 65 U.S.L.W. 3085 (U.S. Oct. 1, 1996); Quill v. Koppell, 870 F. Supp. 78, 84-85 (S.D.N.Y. 1994) (holding that the New York laws did not involve a liberty interest protected by the Due Process Clause nor did the statutes violate the Equal Protection Clause), *rev'd*, Quill v. Vacco, 80 F.3d 716, 731 (2d Cir. 1996) (ruling that the Equal Protection Clause allows physicians to prescribe drugs to be self-administered by mentally competent patients who seek to end their lives during the final stages of a terminal illness), *cert. granted*, 64 U.S.L.W. 3795 (U.S. Oct. 1, 1996); *see also infra* text accompanying notes 58-143.

[8]891 F. Supp. 1429 (D. Or. 1995).

This current right is clearly different than the "right to die" previously addressed by the United States Supreme Court in *Cruzan v. Director, Missouri Dep't of Health*.[9]

This Comment examines the decisions of both the district and circuit courts in *Compassion, Quill,* and *Lee*, as well as Supreme Court precedent to determine whether the right to PAS can be implicitly drawn from the Constitution. Part II of this Comment analyzes these historical Supreme Court cases by first reviewing cases construing constitutional liberty interests including the right to obtain an abortion and the right to refuse or withdraw unwanted medical treatment. Part II also provides a summary of cases interpreting the Equal Protection Clause. Part III provides a review of case history and reasoning of the three recent PAS court rulings: *Compassion, Quill,* and *Lee*. Part IV critiques the three cases and demonstrates why the Supreme Court should reverse *Compassion III* and *Quill II*. Additionally, Part IV recognizes that the Supreme Court should decline to grant a constitutional right in PAS in what could likely be the "most morally laden decision since *Roe v. Wade*."[10] Finally, Part V concludes that the ultimate decision regarding PAS is up to the people of the United States. People should exercise their will through their elected legislatures rather than through lawyers in courtroom proceedings.[11]

---

[9]497 U.S. 261 (1990) (acknowledging that a competent person has a constitutionally protected liberty interest in *refusing* unwanted medical treatment). Conversely, in the PAS cases, courts are determining the right of a patient to *request* sufficient drugs to end his or her life.

[10]Charles Krauthammer, *Assisted-Suicide Rulings Are Judicial Meddling*, NEWSDAY, April 16, 1996, at A38.

[11]It is important to note that debate regarding PAS is to be encouraged and that these cases have helped bring the debate directly to the American people. In fact, public opinion polls indicate that a majority of Americans favor PAS. Ryan, *supra* note 4, at B5. However, this debate should take place in legislative houses rather than in courtrooms.

Further studies display that many patients are receiving physician-aid in dying despite many state laws criminalizing PAS. For instance, The Journal of American Medical Association recently reported that twenty-four percent of patients who requested lethal prescriptions for aid in dying received them. Stephen Jamison, *Dead Right (Physician-Assisted Suicide)*, THE NATION, April 29, 1996, at 4. Legislatures should recall this as well as other concerns while reevaluating their state's laws regarding PAS.

This Comment recognizes that if a right to PAS is not recognized under the Constitution, "litigation may move to state courts under state constitutions." Kathryn L. Tucker and David J. Burman, *Physician Aid in Dying: A Human Option, A Constitutionally Protected Choice,* 18 SEATTLE U. L. REV. 495, 508 (1995). This litigation process is also discouraged. If the people deem it necessary, legislative reform is the appropriate remedy.

II. HISTORY

Due to the lack of Supreme Court precedent regarding PAS, the courts addressing this right have drawn analogies to established Supreme Court cases. In analyzing the right to PAS, courts have concentrated on two areas of constitutional jurisprudence: a liberty interest under the Due Process Clause of the Fourteenth Amendment and an equal protection violation under the Equal Protection Clause of the Fourteenth Amendment.[12] This Part provides relevant Supreme Court case law regarding both areas of constitutional analysis.

A. LIBERTY INTEREST:[13] THE RIGHT TO OBTAIN AN ABORTION

In *Roe v. Wade*,[14] the United States Supreme Court held that a woman

---

[12]Compassion in Dying v. Washington, 850 F. Supp. 1454, 1467 (W.D. Wash. 1994) (holding that the Washington statute violates the Due Process and Equal Protection Clauses of the Constitution), *rev'd*, 49 F.3d 586, 594 (9th Cir. 1995) (ruling that the statute was constitutional), *rev'd en banc*, 79 F.3d 790, 837-39 (9th Cir. 1996) (holding that the Washington statute violated the Due Process Clause), *stay granted*, Washington v. Glucksberg, 116 S. Ct. 2494 (U.S. 1996), *cert. granted*, Washington v. Glucksberg, 65 U.S.L.W. 3085 (U.S., Oct. 1, 1996); Quill v. Koppell, 870 F. Supp. 78, 84-85 (S.D.N.Y. 1994) (holding that the New York laws did not involve a liberty interest protected by the Due Process Clause nor did the statutes violate the Equal Protection Clause), *rev'd*, Quill v. Vacco, 80 F.3d 716, 731 (2d Cir. 1996) (ruling that the Equal Protection Clause allows physicians to prescribe drugs to be self-administered by mentally competent patients who seek to end their lives during the final stages of a terminal illness), *cert. granted*, 64 U.S.L.W. 3795 (U.S. Oct. 1, 1996); Lee v. Oregon, 891 F. Supp. 1429 (D. Or. 1995) (holding that an Oregon statute legalizing PAS for the terminally ill mentally competent "patient" violated the Equal Protection Clause). For the text of the Due Process and Equal Protection Clauses, see *supra* note 2.

[13]The liberty interest "tests" under the Due Process Clause vary. Traditionally, when a liberty right is deemed "fundamental," the state must demonstrate a compelling justification for restricting it. Fundamental liberties include the rights to free speech, travel, marriage, religion, procreation, family formation, and use of contraceptives. Sylvia A. Law, *Physician-Assisted Death: An Essay on Constitutional Rights and Remedies*, 55 MD. L. REV. 292, 297 n.14 (1996) (citations omitted). In contrast, the state may restrict the exercise of nonfundamental liberties if there is a rational basis to support the restriction. *Id.* at 297 n.15 (citing Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955)). In recent years, this traditional approach has eroded and cases like Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), and Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261 (1990) have developed additional "tests" for this doctrine. Law, *supra*, at 297.

[14]410 U.S. 113 (1973).

has a constitutionally protected privacy right to obtain an abortion.[15] The essential holding of *Roe* was reaffirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[16]

In *Casey*, the Court held that a woman has a protected liberty interest in obtaining an abortion before viability[17] without undue interference from the state.[18] The Court determined that a woman's decision to terminate her pregnancy "derives from the Due Process Clause of the Fourteenth Amendment."[19] The joint opinion in *Casey* implicitly rejected *Roe's* view that every pre-viability restriction on the woman's right to choose must survive strict scrutiny. The *Casey* Court did not discuss "fundamental rights" nor "strict scrutiny;" instead, *Casey* centered on the "undue burden" test.[20] In articulating the undue burden test, the joint opinion stated, "[o]nly where state regulation imposes an undue burden on a woman's ability to make this [abortion] decision does the power of the State reach into the heart of liberty protected by the Due Process Clause."[21] Thus, a state regulation will constitute an undue burden if the regulation "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[22]

Therefore, the right to an abortion is not absolute. Consequently, a statute which serves a valid purpose but has an incidental impact on a

---

[15]*Id.* at 153, *modified*, Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

[16]505 U.S. 833 (1992).

[17]Viability is defined in *Casey* as:

> the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman.

Casey, 505 U.S. at 870 (citing Roe v. Wade, 410 U.S. 113, 163 (1973)).

[18]*Id.* at 846.

[19]Id. For the text of the Due Process Clause, see *supra* note 2.

[20]*Id.* at 876.

[21]*Id.* at 874 (citations omitted).

[22]*Id.* at 877.

woman's right to choose will be constitutional, unless it imposes an undue burden on the woman's ability to exercise her right.[23] Of course, after viability, a state may proscribe all abortions not needed to protect the life or health of the mother.[24]

The joint opinion continually emphasized the special nature of an abortion decision and how that decision impacts a woman in a unique and personal way.[25] The opinion also recognized the force of *stare decisis*.[26] Thus, the *Casey* Court might have ruled differently if it were addressing the abortion issue for the first time. Due in part to *stare decisis*, the Court upheld the central holding of *Roe* despite a "reluctance" in reaffirming.[27]

B. LIBERTY INTEREST: THE RIGHT TO REFUSE OR WITHDRAW LIFE-SUSTAINING TREATMENT

Since the seminal case of *In re Quinlan*,[28] courts generally have accepted the principle that competent and incompetent patients alike have the right to withdraw or refuse unwanted medical treatment.[29] The United

---

[23]*Id.* at 874.

[24]*See id.* at 870.

[25]*See id.* at 877 (stating that a statute furthering a state interest cannot have the effect "of placing a substantial obstacle in the path of a *woman's choice*") (emphasis added).

[26]*Id.* at 854-69. *Stare decisis* means "[t]o abide by, or adhere to, decided cases." BLACK'S LAW DICTIONARY 1261 (5th ed. 1979).

[27]Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 861 (1992).

[28]355 A.2d 647 (N.J. 1976), *cert. denied*, Garger v. New Jersey, 429 U.S. 922 (1976).

[29]*See, e.g.*, Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 278 (1990) (stating that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment). The basis in recognizing this right has differed among the courts. For example, the court in *Quinlan* premised its holding upon the constitutional right of privacy. 355 A.2d at 663. Other courts have relied upon the doctrine of informed consent. *See, e.g.*, Matter of Storar, 420 N.E.2d 64 (N.Y. 1981), *cert. denied*, Storar v. Storar, 454 U.S. 858 (1981). This Comment focuses upon *Cruzan*, the only Supreme Court case to rule on "the right to die." For a more detailed analysis concerning the different constitutional theories for refusing or withdrawing unwanted treatment see Elizabeth Gmyrek England, Note and Comment, *The Debate on Physician-Assisted Suicide Reaches the Federal Courts: A Discussion of the Decisions of the District and Circuit*

States Supreme Court addressed this issue, the right to refuse or withdraw unwanted medical treatment, in *Cruzan v. Director, Missouri Dep't of Health*.[30] *Cruzan* is the only United States Supreme Court case that has addressed any "right to die" issue.

In *Cruzan*, petitioner Nancy Cruzan was in a persistent vegetative state in which she had no awareness or cognition.[31] After all the medical authorities agreed that there was virtually no chance that Nancy Cruzan could recover or be aware of her surroundings, her parents, co-petitioners, requested that her physicians remove her feeding and hydration tubes that were keeping her physically alive.[32] When the physicians refused, co-petitioners sought a court order requiring the removal.[33]

The Missouri Supreme Court refused to approve the removal of the life-sustaining equipment.[34] That court, in interpreting Missouri's living will statute, concluded that even if Nancy Cruzan had a Fourteenth Amendment right, the co-petitioners did not prove by clear and convincing evidence that Nancy Cruzan would have removed the equipment had she been competent to make the choice.[35] The United States Supreme Court, by a five to four vote, agreed with the Missouri Supreme Court and held that the continuation of life-sustaining procedures did not violate Nancy Cruzan's Fourteenth Amendment rights.[36]

The *Cruzan* majority began its analysis with the observation that "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment."[37] The Court recognized that once a liberty interest has been determined, the Court then must consider whether the "patient's" constitutional right has been violated by "balancing his liberty

---

Courts in Compassion in Dying v. Washington State, 16 PACE L. REV. 359, 376 (1996).

[30]497 U.S. 261 (1990).

[31]*Id.* at 266.

[32]*Id.* at 267-68.

[33]*Id.* at 268.

[34]*Id.* (citing Cruzan v. Harmon, 760 S.W.2d 408, 416-17 (1988) (en banc)).

[35]*Id.* (citing *Cruzan*, 760 S.W.2d at 419-26).

[36]*Id.* at 284-87.

[37]*Id.* at 278.

interest[s] against the relevant state interests."[38] In *Cruzan*, the state asserted its interests in protecting and preserving life.[39] The majority assumed, but did not decide, that a competent person's right to refuse unwanted treatment would outweigh the countervailing state interests.[40]

The Court rejected the co-petitioners' claims that an incompetent person should have the same right as a competent person in refusing unwanted treatment.[41] The Court recognized that an incompetent person such as Nancy Cruzan is not capable of making a choice, and that this choice must be executed by a surrogate.[42] Therefore, the Court ruled that Missouri may require "clear and convincing" evidence of the desires of Nancy Cruzan because the state's interest in preserving human life was strong and guarded "against potential abuses."[43] Thus, the state could refuse to grant the request to remove life support.[44] However, if Nancy Cruzan were a competent person, her request would have been approved.[45]

C. EQUAL PROTECTION CASES[46]

The equal protection of the laws cannot be denied by any state to any

---

[38]*Id.* at 279 (quoting Youngberg v. Romeo, 457 U.S. 307, 321 (1982)).

[39]*Id.* at 280.

[40]*See id.* at 279.

[41]*Id.* at 279.

[42]*Id.* at 280-81.

[43]*Id.* at 281.

[44]*Id.* at 286-87.

[45]*See id.* at 284 (stating that the petitioners did not meet the "clear and convincing" test through the testimony at trial regarding Nancy Cruzan's statements to a housemate of one year explaining that she did not want to live as a "vegetable"). Therefore, it can be assumed that if Nancy Cruzan were a competent adult and requested the removal of the life-sustaining treatment or if more clear and convincing evidence were available, such as a living will, withdrawal of the "treatment" would have been constitutionally required. *See id.*

[46]Due to the overwhelming number of cases interpreting the Equal Protection Clause and the complexities within the different "tiers" of analysis, this Comment only seeks to provide the reader with a general overview of equal protection jurisprudence.

person within its jurisdiction.[47] This constitutional guarantee requires states to treat in a similar manner all who are similarly situated.[48] However, disparate treatment is not necessarily a violation of the Equal Protection Clause and the Supreme Court has generally deferred to the states in establishing acceptable classifications.[49]

The general rule under the Equal Protection Clause is that legislation carries a presumption of validity if the statutory classification is "rationally related to a legitimate state interest."[50] This rational basis review governs the judicial analysis of legislation regarding economic and social welfare.[51]

On the other end of the spectrum is "strict scrutiny." Strict scrutiny is the standard of review where a classification "impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class."[52] Fundamental rights are those rights derived from the Constitution itself[53] and suspect classes include those

---

[47]U.S. CONST. amend XIV, § 1. For the text of the Equal Protection Clause, see *supra* note 2.

[48]Eisenhardt v. Baird, 405 U.S. 438, 446-47 (1972) (citation omitted).

[49]*See, e.g.*, Plyer v. Doe, 457 U.S. 202 (1982). In *Plyer*, the Court stated that:

> [t]he initial discretion to determine what is "different" and what is the "same" resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose.

Id. at 216 (citations omitted).

[50]City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985).

[51]*See, e.g.*, Bowen v. Owens, 476 U.S. 340, 345 (1986). A slightly stricter standard has sometimes been enunciated by the Court: "[t]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . . ." F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

[52]Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976).

[53]*See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973).

identified by race, alienage, or national origin.[54] Where strict scrutiny is invoked, the classification will be upheld only if it is necessary to promote a compelling governmental interest.[55]

The last level of scrutiny employed by the Court in analyzing certain equal protection violations is intermediate scrutiny. This scrutiny is employed in cases based on gender or illegitimacy.[56] The applicable standard is that "classifications by gender [and illegitimacy] must serve important governmental objectives and must be substantially related to the achievement of those objectives."[57]

III. RECENT COURT RULINGS REGARDING THE RIGHT TO PAS

This Part begins with an analysis of *Compassion in Dying* and due process jurisprudence. Next, this Part focuses on *Quill v. Koppell*, *Quill v. Vacco* and equal protection analysis. The case histories of both *Compassion* and *Quill* are reviewed in chronological order. Finally, this Part examines *Lee v. Oregon* because Oregon was the first state to decriminalize PAS, yet it displays a "Catch 22" in equal protection jurisprudence.

A. *COMPASSION IN DYING V. WASHINGTON*

The initial lawsuit concerning the right to PAS was commenced by Compassion in Dying,[58] three terminally ill individuals, and five physicians.

---

[54]*See, e.g.*, *Cleburne*, 473 U.S. at 440-42 (holding that mental retardation is not a suspect classification and that it does not call for a "more exacting standard of judicial review than is normally accorded economic and social legislation").

[55]*See, e.g.*, Korematsu v. United States, 323 U.S. 214, 217-18 (1944) (upholding a post-Pearl Harbor military order excluding all persons of Japanese ancestry on the theory that there was a compelling need to prevent espionage and sabotage, and that there was no practical way for the military to distinguish between Japanese loyal to Japan and those loyal to the United States). A highly criticized opinion, *Korematsu* was one "of the very rare cases in which a classification based on race [or ethnic classification] survived strict scrutiny." GERALD GUNTHER, CONSTITUTIONAL LAW 638 (12th ed. 1991).

[56]*See, e.g.*, Clark v. Jeter, 486 U.S. 456, 461 (1988).

[57]Craig v. Boren, 429 U.S. 190, 197 (1976).

[58]Compassion in Dying is "an organization which provides support, counseling and assistance to mentally competent, terminally ill adults considering suicide." Compassion in Dying v. Washington, 850 F. Supp. 1454, 1456 (W.D. Wash. 1994), *rev'd*, 49 F.3d

The plaintiffs challenged the constitutional validity of a Washington statute that banned PAS by mentally competent, terminally ill adults.[59]

The Chief Judge of the United States District Court for the District of Washington, Barbara J. Rothstein, found the statute unconstitutional because it places an undue burden on the exercise of a liberty interest protected by the Fourteenth Amendment.[60] The trial court first determined that the United States Supreme Court established a long line of cases that constitutionally protects personal decisions such as marriage, procreation, contraception, family relationships, child rearing, and education.[61] In support of the court's determination that PAS is a liberty interest, Chief Judge Rothstein ruled that "the reasoning in *Casey* [is] highly instructive and almost prescriptive."[62] The court also found *Cruzan v. Director, Missouri Dept. of Health*[63] "instructive" in determining whether a "right" to PAS exists.[64] The court referred to *Cruzan's* recognition of a general liberty

---

586 (9th Cir. 1995), *rev'd en banc,* 79 F.3d 790 (9th Cir. 1996), *stay granted,* Washington v. Glucksberg, 116 S. Ct. 2494 (U.S. 1996), *cert. granted,* Washington v. Glucksberg, 65 U.S.L.W. 3085 (U.S., Oct. 1, 1996) [hereinafter *Compassion I*].

[59]*Compassion I,* 850 F. Supp. at 1458-59 (citing WASH. REV. CODE § 9A.36.060(1)). The Washington statute provides that "[a] person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide." Further, promoting a suicide attempt is a class C felony punishable by imprisonment for a maximum of up to five years and a fine up to ten thousand dollars. *Id.* at 1459 (citing WASH. REV. CODE §§ 9A.36.060(2), 9A.20.020(1)(c)).

[60]*Id.* at 1467.

[61]*Id.* at 1459 (citations omitted).

[62]*Id. Casey* states that:

> [t]hese 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.

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992).

[63]497 U.S. 261 (1990).

[64]*Compassion I,* 850 F. Supp. at 1461.

interest in refusing medical treatment.[65] Combining the Supreme Court's reasoning from *Casey* and *Cruzan*, and determining that no constitutional distinction existed "between refusing life-sustaining medical treatment and physician-assisted suicide by an uncoerced, mentally competent, terminally ill adult,"[66] the Chief Judge reached the conclusion that a constitutional right to PAS existed.[67]

Next, the district court determined the applicable standard of review. The court decided that the appropriate test to determine the Washington statute's constitutional validity was whether the plaintiffs could show an "undue burden" on their personal right.[68] The district court declared that a "total ban" on PAS for the terminally ill created an undue burden on the patient's right despite the two purported state interests of preventing suicide and protecting people from undue influence.[69] The court further declared that the state could regulate PAS.[70]

Additionally, the Chief Judge stated that the Washington law was unconstitutional because it violated equal protection by prohibiting PAS while "permitting the refusal or withdrawal of life support systems for terminally ill" patients.[71] In other words, the district court found no constitutional distinction between the two groups and, accordingly, found an unequal application of the laws.[72]

---

[65]*Id.* at 1461 (quoting Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 278 (1990)).

[66]*Id.* at 1461.

[67]*Id.* at 1462.

[68]*Id.* (quoting Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992)).

[69]*Id.* at 1465.

[70]In essence, the court is striking down an act as unconstitutional and then calling for more legislation. The court stated that "this concern can be answered by devising safeguards and imposing restrictions on physician-assisted suicide to ensure the knowing and voluntary nature of the decision." *Id.* at 1466.

[71]*Id.* at 1467.

[72]A detailed analysis regarding the equal protection analysis within *Compassion* is unnecessary due to the Ninth Circuit's *en banc* decision (*Compassion III*) which limited the analysis to the Due Process Clause of the Fourteenth Amendment. Compassion in Dying v. Washington, 79 F.3d 790, 838 (9th Cir. 1996) (en banc), *stay granted*, Washington v. Glucksberg, 116 S. Ct. 2494 (1996), *cert. granted*, Washington v.

On appeal, the United States Court of Appeals for the Ninth Circuit reversed the district court's decision.[73] Judge John T. Noonan, Jr., writing for a two to one majority, found the statute constitutional.[74] First, Judge Noonan determined that the language from *Casey* should not be controlling because it "should not be removed from the context in which it was uttered."[75] The court also determined that if such a liberty interest existed then it belonged to all Americans, not just the terminally ill.[76]

In reaching its decision, the Court of Appeals reasoned that *Casey* did not involve the termination of one's own life and the right in *Cruzan,* although it involved the termination of one's life, was different.[77] Judge Noonan stated that the *Cruzan* majority successfully distinguished between PAS and refusing treatment, while the trial court failed to do so. The relevant part of the *Cruzan* opinion, according to Judge Noonan is that:

> there can be no gainsaying a state's interest 'in the protection and preservation of human life' and, as evidence of that legitimate concern, the fact that 'the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide.'[78]

Glucksberg, 65 U.S.L.W. (U.S. Oct. 1, 1996). *See infra* text accompanying note 102.

[73]Compassion in Dying v. Washington, 49 F.3d 586 (9th Cir. 1995), *rev'd en banc*, 79 F.3d 790 (9th Cir. 1996), *stay granted*, Washington v. Glucksberg, 116 S. Ct. 2494 (1996), *cert. granted*, Washington v. Glucksberg, 65 U.S.L.W. (U.S. Oct. 1, 1996) [hereinafter *Compassion II*]. Judge Noonan listed seven reasons for reversing the trial court. 49 F.3d at 592-93.

[74]*Id.* at 593.

[75]*Id.* at 590.

[76]*Id.* at 591 (citation omitted).

[77]It is recognized that much debate could occur regarding "one's life." However, whether a fetus is "alive" is outside the scope of this Comment, which considers *Casey's* language concerning "viability." Also note that a state may proscribe all abortions not needed to protect the health or life of a mother after viability. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 846 (1992). This suggests that great deference should be given to a state's interest in preserving life once a person is "viable." *See id. See also supra* note 9 (discussing the difference between the right at issue in *Cruzan* and the right to PAS).

[78]*Compassion II*, 49 F.3d at 591 (citing Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 280 (1990)).

Thus, Judge Noonan concluded that the majority in *Cruzan* recognized a difference between seeking help to bring about death, the right to PAS, and refusing life support. Therefore, if the Supreme Court recognizes a difference, so too should all courts which interpret the Constitution.

The circuit court also noted that the district court's opinion lacked foundation in the traditions of our nation.[79] Judge Noonan opined that "in the two hundred and five years of our existence no constitutional right to aid in killing oneself has ever been asserted and upheld by a court of final jurisdiction."[80] The court concluded that a federal court should not "invent a constitutional right."[81]

Additionally, the court observed that the district court failed to properly weigh the state's interests which "individually and convergently outweigh any alleged liberty of suicide."[82] The court also criticized the district court's holding involving equal protection. Recognizing that the distinction in this case was not one of gender, race, or any other protected class, nor was it infringing on any constitutional right, Judge Noonan concluded that the plaintiffs did not meet their burden of displaying "that the legislature's actions were irrational."[83]

Lastly, the Court of Appeals recognized that the "right to be let alone is yours."[84] However, Judge Noonan also articulated that when an individual asks someone else to aid in his or her death, especially someone licensed by the state, that individual is seeking more than the recognized

---

[79]*Id.* (citing Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)).

[80]*Id.*

[81]*Id.*

[82]*Id.* at 591 (citations omitted). The court listed five state interests: (1) the interest in not having physicians play a role in the killing of their patients; (2) the interest in preventing psychological pressure upon patients to consent to their own deaths; (3) the interest in protecting the poor and minorities from exploitation; (4) the interest in protecting the handicapped from societal indifference and antipathy; and (5) the interest in preventing the abuse that occurred in the Netherlands, which created legal guidelines allowing assisted suicide in 1984. *Id.* at 592-93.

[83]*Id.* at 593-94 (citing Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 458 (1988)). *See supra* notes 47-57 (discussing the Court's equal protection jurisprudence).

[84]*Id.* at 594 (citing Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

right of autonomy.[85] Thus, the court concluded, "the validity of the statute must be upheld."[86]

Because of the divergent opinions and due to the importance of the issue, the Ninth Circuit granted review *en banc*.[87] The *en banc* court issued an eight to three decision, drafted by Circuit Judge Reinhardt, reversing the three-judge panel and affirming the district court's opinion.[88] The *en banc* court held that the Due Process Clause of the Fourteenth Amendment contains "a constitutionally-protected interest in determining the time and manner of one's own death."[89] Weighing the individual's liberty interest against the state's interests, the court held the statute unconstitutional in that it prohibits physicians from prescribing life-ending medication to mentally competent, terminally ill adults.[90]

Judge Reinhardt explicitly stated that he did not characterize this case as a "constitutional right to aid in killing oneself," preferring to characterize it as the "right to die" or "liberty interest in determining the time and manner of one's own death."[91] Judge Reinhardt used this broader application in order to include the act of refusing or terminating unwanted medical treatment.[92] In determining whether a liberty interest in PAS

---

[85]*See id.* at 594.

[86]*Id.*

[87]Compassion in Dying v. Washington, 62 F.3d 299 (9th Cir. 1995).

[88]Compassion in Dying v. Washington, 79 F.3d 790, 793 (9th Cir. 1996), *stay granted*, Washington v. Glucksberg, 116 S. Ct. 2494 (1996), *cert. granted*, Washington v. Glucksberg, 65 U.S.L.W. 3085 (U.S. Oct. 1, 1996) [*Compassion III*].

[89]*Id.*

[90]*Id.* The court determined that a liberty interest in the right to PAS exists by analogizing *Cruzan* and *Casey*. *Id.* at 815-37. The Court then performed *Casey's* undue burden test to determine that the statute is unconstitutional. *Id.* *See also infra* text accompanying notes 99-101.

This Comment agrees with Judge Noonan in that the *Casey* and *Cruzan* decisions should be limited and that the undue burden standard is inapplicable in PAS litigation. *Compassion II*, 49 F.3d at 590-91. *See also supra* text accompanying notes 73-86.

[91]*Compassion III*, 79 F.3d at 801-02.

[92]*Id.* This is one of the critical flaws of *Compassion III*. Compassion in Dying v. Washington, 85 F.3d 1440, 1447 (9th Cir. 1996) (en banc) (Trott, J., dissenting), *cert. granted*, Washington v. Glucksberg, 65 U.S.L.W. 3085 (U.S. Oct. 1, 1996); *see also infra* text accompanying note 116.

existed, Judge Reinhardt first noted that historically, the Court classified "fundamental rights" as those that are implicit in the concept of ordered liberty.[93] The judge noted that the Court has recently expressed a strong reluctance to find new fundamental rights and is only inclined to do so if the liberty is so deeply rooted in this nation's history.[94]

Despite the Court's apparent reluctance against creating new fundamental rights, Judge Reinhardt stated that *Casey* rejected the view that substantive due process protects only those rights or liberties which possess a historical pedigree.[95] Thus, Judge Reinhardt, like the district court, continually relied upon *Casey*, an abortion case, and *Cruzan*, a case involving the discontinuance of unwanted medical treatment.[96]

By analogizing the issue of PAS to these cases, the *en banc* court determined that the Constitution protects the individual's right to make certain important decisions regarding the time and manner of one's death.[97] Nevertheless, the court noted that this right would be subject to state regulation.[98]

After creating this liberty interest, the court balanced the individual's rights against the state's interests.[99] Despite the legitimacy of the state's interests, Judge Reinhardt, persuaded by *Casey's* language, determined that the individual's liberty interest in "the right to die" outweighed the state's interest because the statute involved an absolute ban of that "right."[100] For

---

[93]*Id.* at 803 (citing Palko v. Connecticut, 302 U.S. 319, 325-26 (1937); Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).

[94]*Id.* (citing Collins v. City of Harker Heights, Tex., 112 S. Ct. 1061, 1068 (1982)).

[95]*Id.* at 804-05 (citation omitted).

[96]*Id.* at *passim.*

[97]*Id.* at 816 (stating that *Cruzan* and *Casey* are persuasive in determining whether there is a liberty interest in the right to die).

[98]*Id.*

[99]The court recognized six state interests: 1) the state's interest in preserving life; 2) the state's interest in preventing suicide; 3) the state's interest in involving third parties and in precluding the use of arbitrary, unfair, or undue influence; 4) the state's interest in protecting loved ones and family members; 5) the state's interest in the medical profession's integrity; and 6) the state's interest in avoiding the adverse consequences of declaring the statute unconstitutional. *Id.* at 815-16.

[100]*Id.* at 837-39.

example, the *en banc* majority stated that the right to die liberty interest for a terminally ill patient is at its peak, while the state interest in preserving life, equally important in the abstract, is at its low point due to the time frame left in the individual's life.[101] Finally, the court determined that it need not consider whether the statute violated the Equal Protection Clause because it was already unconstitutional based upon the Due Process Clause.[102]

In his dissent, Judge Beezer stated that in order for a statute to violate substantive due process, the party challenging the statute must prove either:

> (1) that the statute violates a fundamental right and is not narrowly tailored to serve a compelling state interest, or (2) that the statute violates an ordinary, nonfundamental, liberty interest and does not rationally advance some legitimate governmental purpose.[103]

Judge Beezer opined that the individual's interest is more accurately described as PAS, rather than "the right to die," and that the right is merely an ordinary, nonfundamental liberty interest.[104] Thus, Judge Beezer concluded that the statute was constitutional under the second analysis because it rationally advanced four legitimate government purposes: preserving life, protecting innocent third parties, preventing suicide, and maintaining the medical profession's ethical integrity.[105]

Judge Fernandez also wrote a dissenting opinion, unconvinced that a constitutional right to commit suicide existed.[106] Judge Fernandez observed that the issue is "one 'for the people to decide.'"[107] Judge Kleinfeld, the

---

[101]*Id.* at 837.

[102]*Id.* at 838.

[103]*Id.* at 839 (Beezer, J., dissenting) (citing Reno v. Flores, 507 U.S. 292, 301-06 (1993)).

[104]*Id.* at 840 (Beezer, J., dissenting).

[105]*Id.* at 839 (Beezer, J., dissenting).

[106]*Id.* at 857 (Fernandez, J., dissenting).

[107]*Id.* (quoting Guadalupe Org., Inc. v. Tempe Elementary Sch. Dist. No. 3, 587 F.2d 1022, 1027 (9th Cir. 1978)). This is the central theme of this Comment. "People" refers to a legislative body or citizens directly casting votes on the issue. It does not refer to patients individually making a "right to die" choice as *Compassion III* articulates. 79 F.3d

last dissenter, also doubted that a constitutional right to commit suicide existed.[108]

The Ninth Circuit declined to rehear the case in front of the full Ninth Circuit.[109] This decision prompted vigorous dissents from Judges O'Scannlain and Trott, with Judge Kleinfeld joining both dissents. Judge O'Scannlain began by questioning the wisdom of the *en banc* court, stating that six men and two women created a new constitutional right, unheard of in over 200 years, which was rejected by the people of the state of Washington only five years ago.[110]

Judge O'Scannlain, like the three judge panel, stated that the majority erred by resting on the language of *Casey*.[111] The judge stated that *Casey* upheld the right to an abortion based upon *stare decisis* rather than a reasoned reaffirmation of the notion that abortion constitutes a protected liberty interest.[112] Therefore, Judge O'Scannlain asserted that *Casey* is a "thin thread" on which to rest the current holding.[113]

Judge Trott wrote another strong dissenting opinion.[114] The judge

---

at 839.

[108]*Id.* at 857 (Kleinfeld, J., dissenting).

[109]85 F.3d 1440, 1440 (9th Cir. 1996) (en banc), *cert. granted*, Washington v. Glucksberg, 65 U.S.L.W. 3085 (U.S. Oct. 1, 1996). The Ninth Circuit is the only appellate court in the federal system that allows a limited *en banc* review. *Id.* at 1441. This occurred in *Compassion III*. This holding declined the Ninth Circuit's ability to review the case in front of the entire 28 judge circuit. *Id.* at 1440-41.

[110]*Id.* at 1440 n.1 (O'Scannlain, J., dissenting) (stating that "[i]n November 1991, the people of Washington rejected Initiative 119, which would have permitted physicians to assist terminally ill patients in committing suicide").

[111]*Id.* at 1443 (O'Scannlain, J., dissenting) (citing Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992)). Judge O'Scannlain also stated that the court erred "by resting its holding on obvious distortions of the language in . . . *Cruzan*." *Id.* (citing Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261 (1990)).

[112]*Id.* (citing *Casey*, 505 U.S. at 870-72).

[113]*Id.* at 1443-44 (O'Scannlain, J., dissenting).

[114]Judge Trott's articulation was the most critical and is worthy of reproduction:

> No magician — not David Copperfield, not even Harry Houdini — can produce a rabbit from a hat unless the rabbit is in the hat to begin with. Moreover, if a hat does not contain such an animal, a magician cannot claim

stated that:

> [p]assive euthanasia, or letting death run its course, is one thing, and suicide another, but active euthanasia, or permitting one person to kill another — even at that person's competent request — seems massively different.[115]

Further, Judge Trott criticized the *en banc* majority's characterization of PAS as "a right to die" because this broad application violates the Supreme Court's declaration that a substantive due process analysis must begin with a careful description of the "right."[116]

B. *QUILL V. KOPPELL* AND *QUILL V. VACCO*

Similar to the statutes at issue in *Compassion*,[117] the *Quill* decisions involved New York laws that criminalized aiding a person in committing suicide, or in attempting suicide.[118] The *Quill v. Koppell* action was commenced on July 20, 1994, by three named physicians and three patients.[119] The defendants included then Attorney General of New York Koppell, former Governor Mario Cuomo, and New York County District

---

> that anything he is able to produce from it is in fact a rabbit, no matter how sincere he may be or how great his forensic skills . . . . Judge Reinhardt's opinion on behalf of our en banc court demonstrates . . . he has in fact succeeded in pulling a nonexistent liberty interest out of thin constitutional air . . . .

Id. at 1446-47 (Trott, J., dissenting).

[115]*Id.* at 1447 (Trott, J., dissenting).

[116]*Id.* (quoting Collins v. City of Harker Heights, 503 U.S. 115, 126 (1992), *quoted in*, Reno v Flores, 507 U.S. 292, 302 (1993)).

[117]See *supra* note 59 discussing the Washington statutes held unconstitutional in Compassion in Dying v. Washington, 79 F.3d 790, 858 (ruling on WASH. REV. CODE §§ 9A.36.060(1), 9A.36.060.(2)).

[118]N.Y. PENAL LAW §§ 125.15(3), 120.30 (McKinney 1996).

[119]Quill v. Koppell, 870 F. Supp. 78, 79 (S.D.N.Y. 1994), *rev'd*, Quill v. Vacco, 80 F.3d 716 (2d Cir. 1996), *cert. granted*, 64 U.S.L.W. 3795 (U.S., Oct. 1, 1996) [hereinafter *Quill I*].

Attorney Morganthau.[120]

Chief Judge Griesa first addressed the due process issue.[121] Here, as in *Compassion*,[122] the plaintiffs relied on *Casey* and *Cruzan*. The district court concluded that the "[p]laintiffs' reading of these cases is too broad."[123] Judge Griesa stated that suicide implicates a sufficiently different legal significance than requesting withdrawal of treatment so that a fundamental right to PAS cannot be inferred from *Cruzan*.[124] Further, the court stated that the Supreme Court has been careful to emphasize that the abortion rulings should not be relied upon to recognize other fundamental rights.[125]

In determining the lack of a liberty interest, the court also stated that the plaintiffs failed to argue that PAS, even in the case of terminally ill patients, has any historical recognition as a legal right.[126] The court then analyzed suicide and recognized that it was previously a crime under English common law and, even today, the majority of states impose penalties on PAS.[127] Therefore, the court concluded that the case did not involve a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment.[128]

---

[120]*Id.*

[121]*Id.* at 82. Other issues were involved in *Quill I*. For example, the defendants asserted that there was no justiciable case or controversy as required by the Constitution. *Id.* at 81 (citing U.S. CONST. art. III). This Comment, however, only focuses upon the right to PAS issues.

[122]Compassion in Dying v. Washington, 850 F. Supp. 1454 (W.D. Wash. 1994), *rev'd*, 49 F.3d 586 (9th Cir. 1995), *rev'd en banc*, 79 F.3d 790 (9th Cir. 1996), *stay granted*, Washington v. Glucksberg, 116 S. Ct. 2494 (U.S. 1996), *cert. granted*, Washington v. Glucksberg, 65 U.S.L.W. 3085 (U.S., Oct. 1, 1996); *see supra* text accompanying notes 58-102.

[123]*Quill I*, 870 F. Supp. at 83.

[124]*Id.*

[125]*Id.* at 83 (citing Bowers v. Hardwick, 478 U.S. 186, 191 (1986); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68 n.15 (1973)).

[126]*Id.* at 83 (citing *Bowers*, 478 U.S. at 191-92).

[127]*Id.* at 84 (citing Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 280 (1990)).

[128]*Id.*

After dispensing with the liberty interest argument, Chief Judge Griesa analyzed whether the statute was unconstitutional based upon the plaintiffs' equal protection claim.[129] The plaintiffs asserted that if "a competent person may refuse medical treatment, even if the withdrawal of such treatment will result in death,"[130] then PAS is essentially equivalent and, therefore, a violation of the Fourteenth Amendment.[131]

The court stated that the issue was whether the distinction drawn by New York law has a rational basis.[132] In addressing this issue, Judge Griesa stated:

> [I]t 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.[133]

The court further declared that the state maintains interests in preserving life and protecting vulnerable citizens: therefore, there was no violation of the Equal Protection Clause of Fourteenth Amendment.[134] In concluding, Judge Griesa recognized that the recent public debate regarding PAS should be left to the democratic processes of the state.[135]

The Second Circuit reversed Judge Griesa and determined that no rational basis existed for distinguishing between a death resulting from an omission of unwanted treatment and death resulting from PAS.[136]

---

[129]*Id.* at 84-85. For the text of the Equal Protection Clause, see *supra* note 2.

[130]*Id.* at 84 (citing Rivers v. Katz, 495 N.E.2d 337, 340 (N.Y. 1986); In re Storar, 420 N.E.2d 64 (N.Y. 1981); Schloendorff v. Soc'y of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914)).

[131]*Id.*

[132]*Id.* (citing Dandridge v. Williams, 397 U.S. 471, 485 (1969)). *See supra* text accompanying notes 47-57 discussing the Equal Protection Clause.

[133]*Id.* at 84.

[134]*Id.* at 84-85 (applying rational basis review and holding that the New York laws did not violate the Equal Protection Clause).

[135]*Id.* at 85.

[136]Quill v. Vacco, 80 F.3d 716, 718 (2d Cir. 1996), *cert. granted*, 64 U.S.L.W. 3795 (U.S. Oct. 1, 1996).

However, the court agreed with the lower court's decision regarding the Due Process Clause and declined to create a new fundamental right.[137]

In analyzing the claim that the New York statutes violated the Equal Protection Clause, the court first recognized that state legislation carries a presumption of validity if the statutory classification is rationally related to a legitimate state interest.[138] Thus, the appellate court, as did the lower court, properly proceeded with the rational basis test,[139] but concluded that the statutes lacked any rational basis to a legitimate governmental interest.[140] Circuit Judge Miner declared that

> the New York statutes criminalizing assisted suicide violate the Equal Protection Clause because, to the extent that they prohibit a physician from prescribing medications to be self-administered by a mentally competent, terminally ill person in the final stages of his terminal illness, they are not rationally related to any legitimate state interest.[141]

Based on this reasoning, the court reversed the judgment of the district court[142] and became the second federal court to rule that state statutes

---

[137]*Id.* at 725.

[138]*See id.* at 725-26 (quoting City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985)); *see also supra* text accompanying notes 47-57 (discussing the different levels of scrutiny employed by courts in evaluating an equal protection claim). The court properly concluded that the issue did not involve a fundamental right and, therefore, the strict scrutiny standard of review was not utilized because the terminally ill are not a suspect class. *Quill II*, 80 F.3d at 726 (citations omitted). The court also declined to review the statute based upon an intermediate level of scrutiny because that scrutiny is usually reserved for classifications based on sex or illegitimacy. *Id.* at 726-27 (citations omitted).

[139]*See supra* text accompanying notes 49-51 (discussing the applicability of the rational basis review in testing social or economic categorizations).

[140]*Quill II*, 80 F.3d at 731. This Comment disagrees with this analysis. *See infra* notes 169-73 and accompanying text.

[141]*Id.* at 731. This analysis appears to be at odds with the deferential rational basis test. *See supra* notes 47-57 and accompanying text. *See also infra* notes 169-73 and accompanying text. Additionally, the fact that a court thinks the objective behind the legislation is unwise is insufficient to make it illegitimate. *See, e.g.*, NOWAK, ROTUNDA, AND YOUNG, CONSTITUTIONAL LAW 529 (3rd ed. 1986) (citation omitted).

[142]*Quill II*, 80 F.3d at 731.

criminalizing PAS were unconstitutional.[143]

C. *LEE V. OREGON*

Lee v. Oregon[144] presents a possible obstacle in legalizing PAS for the terminally ill mentally competent "patient." The people of Oregon approved Ballot Measure 16, the Oregon Death with Dignity Act ("DWDA"), the first law of its kind to be enacted in this country.[145] In *Lee*, the plaintiffs alleged an equal protection violation and sought to show that the statute was not rationally related to a legitimate interest in allowing PAS.[146] The DWDA appears to address the concerns of the most recent opinions of the Ninth and Second Circuits,[147] in that it allowed PAS while creating safeguards. In fact, the *en banc* panel in *Compassion III* criticized the *Lee* opinion.[148]

The voters of Oregon passed a referendum in 1994 allowing mentally competent, terminally ill individuals with less than six months to live to receive a prescription from a doctor in order to hasten their death.[149] The court declared this statute unconstitutional because it violated the Equal

---

[143]*Id.* The *Compassion* case was the first federal court decision upholding the right to PAS. Compassion in Dying v. Washington, 79 F.3d 790, 794 (9th Cir. 1996), *stay granted*, Washington v. Glucksberg, 116 S. Ct. 2494 (1996), *cert. granted*, Washington v. Glucksberg, 65 U.S.L.W. 3085 (U.S. Oct. 1, 1996).

[144]891 F. Supp. 1429 (D. Or. 1995).

[145]Stephen K. Bushong and Thomas A. Balmer, *Breathing Life Into the Right To Die: Oregon's Death With Dignity Act*, 11 ISSUES L. & MED. 269, 269 (1995).

[146]Robert L. Kline, *The Right to Assisted Suicide in Washington and Oregon: The Court's Won't Allow a Northwest Passage*, 5 B.U. PUB. INT. L.J. 213 (1996) (citing *Lee*, 891 F. Supp. at 1429).

[147]*Compassion III*, 79 F.3d 790; Quill v. Vacco, 80 F.3d 716 (2d Cir. 1996), *cert. granted*, 64 U.S.L.W. 3795 (U.S. Oct., 1996).

[148]*Compassion III*, 79 F.3d at 837-38 (stating that the *Lee* holding is contrary to the *Compassion III* holding).

[149]OR. REV. STAT. 127.805 § 2.01 (1995). The statute allows terminally ill adult patients to make a written request for medication for the purpose of ending his or her life in a humane and dignified manner. Two persons must witness this request, but one cannot be a relative or someone who could be financially affected by the patient's decision. The witnesses must be able to attest that the patient is capable, acting voluntarily, and is without reservation. OR. REV. STAT. 127.897 § 6.01 (1995).

Protection Clause.[150] The court agreed with the plaintiffs' claims that no rational basis existed for the DWDA and found that the statute failed to provide adequate safeguards against suicides by mentally incompetent patients.[151]

Despite the state's argument[152] and the safeguards[153] within the statute, the court analyzed the Act and noted that it failed to provide for psychiatric evaluations, second opinions, and lowered a doctor's standard from a "reasonable standard of care" to "good faith."[154] The court emphasized these failures in concluding that the statute did not pass the rational basis test[155] because the state declined to adequately safeguard the mentally incompetent. The court reached this result by focusing on other

---

[150]*Lee*, 891 F. Supp. at 1429. The court did not address the plaintiffs' claims that the statute violated the Due Process Clause of the Fourteenth Amendment, the Free Exercise Clause of the First Amendment, and the Americans with Disabilities Act. *Id.* at 1437. For the text of the Equal Protection and Due Process Clauses, see *supra* note 2.

[151]*Id.* at 1434.

[152]The state argued that it maintained the following interests: 1) avoiding unnecessary pain and suffering; 2) preserving and enhancing the right of competent adults to make their own decisions; 3) avoiding tragic cases of attempted or successful suicides; 4) protecting the terminally ill and their families from family hardship; and 5) protecting the terminally ill and their loved ones from unwanted intrusion into their personal affairs. *Id.*

[153]The DWDA's safeguards included:

> requirements that the physician inform the patient of the medical diagnosis, prognosis, the potential risks, probable result, and feasible alternatives. The attending physician must then refer the individual to a consulting physician for a second opinion and refer the patient to counseling when appropriate. The physician should also request that the patient notify his or her next of kin. . . . The patient must make two oral requests fifteen days apart and a written request forty-eight hours prior to the prescription. [Finally,] the patient always has the opportunity to rescind . . . .

Kline, *supra* note 146, at 232 (citing OR. REV. STAT. 127.815 §§ 3.01(2)(a)-(e), 3.01(3), 3.01(5), 3.01(6), 3.06 (1995)).

[154]*Lee,* 891 F. Supp. at 1437.

[155]The court's "rational basis" test inappropriately appears to be a heightened scrutiny test. In fact, the court states that "people have not been permitted to relinquish important interests without *careful scrutiny*." *Id.* at 1438 (emphasis added). Thus, it appears that *Lee* has formulated a new test that the Supreme Court has yet to recognize. *See supra* notes 47-57 and accompanying text (discussing equal protection analysis).

Oregon statutes that protected residents from committing suicide and which required psychiatrists or other state certified mental health specialists to analyze the patient.[156] The court concluded that the statute "provides a means to commit suicide to [a severely overinclusive class of people] who may be competent, incompetent, unduly influenced, and/or abused at the time of death."[157]

IV. A CRITIQUE OF *COMPASSION III*, *QUILL II*, AND *LEE*

The Ninth Circuit Court of Appeals determined *en banc* that a right to PAS exists due to a "patient's" liberty interest under the Due Process Clause.[158] In determining this "right to die," the court analogized the situation to seminal abortion cases decided by the Supreme Court.[159] These analogies should be limited. The United States is the only western country to legalize abortion through judicial fiat instead of by popular vote or legislation action.[160] More importantly, *Compassion III* failed to recognize the significance of *stare decisis* in the Court's reasoning in *Casey*.[161] Further, *Compassion III*'s extension of *Casey's* language regarding personal dignity and autonomy fails to limit the potential for extending this liberty interest to all personal choices.

Additionally, in determining that a Due Process violation occurred in not allowing PAS for terminally ill competent adults, the Ninth Circuit in

---

[156]*Lee*, 891 F. Supp. at 1437 (citations omitted). In contrast, the statute at issue allows physicians instead of psychiatrists to evaluate the patient. *See supra* note 153 (discussing OR. REV. STAT. 127.815 § 3.01).

[157]*Id.* at 1438.

[158]Compassion in Dying v. Washington, 79 F.3d 790, 838-39 (9th Cir. 1996), *stay granted*, Washington v. Glucksberg, 116 S. Ct. 2494 (1996), *cert. granted*, Washington v. Glucksberg, 65 U.S.L.W. 3085 (U.S. Oct. 1, 1996). For the text of the Due Process Clause, see *supra* note 2.

[159]Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

[160]Krauthammer, *supra* note 10, at A38. The article questions the wisdom of further judicial legislation by citing the twenty-five years of "social and political turmoil" since Roe v. Wade. *Id.* In the case of PAS, if a twenty-five year struggle is necessary, it should take place in the legislature and not in the courts.

[161]505 U.S. at 854-69.

Compassion III relied upon *Cruzan*. The liberty interest in *Cruzan*, however, only applies to the withdrawal or refusal of life support and does not apply to PAS.[162] Under *Cruzan*, the Supreme Court implied that a person holds a constitutionally protected liberty interest in refusing medical treatment.[163] This results in the hastening of one's own natural death. However, prescribing a lethal dosage does not hasten one's natural death, rather the prescription *causes* the death.[164]

Further, assisted-suicide does not fit within the definition of fundamental rights.[165] Additionally, last year the Supreme Court implicitly addressed the issue by refusing to review a case brought by Michigan's "Doctor Death," Dr. Kevorkian.[166] Thus, the holding of *Compassion III*

---

[162]Judge Noonan correctly noted this in the first Ninth Circuit opinion. Compassion in Dying v. Washington, 49 F.3d 586, 591 (9th Cir. 1995), *rev'd en banc*, 79 F.3d 790 (9th Cir. 1996), *stay granted*, Washington v. Glucksberg, 116 S. Ct. 2494 (1996), *cert. granted*, Washington v. Glucksberg, 65 U.S.L.W. (U.S. Oct. 1, 1996); *see supra* text accompanying notes 73-86. *See also supra* note 9 (discussing the difference between PAS and the refusal of medical treatment).

[163]Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 269-79 (1990).

[164]Although this Comment recognizes that PAS is taking place, it is important to realize that the American Medical Association ("AMA") is opposed to such a practice. In an amicus brief submitted in *Compassion III*, the AMA attached a Journal of American Medicine article that concluded: "the societal risk of involving physicians in medical interventions to cause patients' death is too great in this culture to condone . . . physician-assisted suicide . . . ." Compassion in Dying v. Washington, 79 F.3d 790, 830 n.108 (9th Cir. 1996) (citation omitted).

[165]Throughout history, assisted-suicide has been deemed criminal. According to filings in the cases for which the Supreme Court has granted *certiorari*, "at least 30 states now ban physician-assisted suicide." Joan Biskupic, *Court to Hear Two Cases on Right to Die; Justices to Review Bans on Doctor-Assisted Suicide*, WASHINGTON POST, Oct. 2, 1996, at A01 (citation omitted).

Moreover, reversal appears appropriate because assisted-suicide has no "roots" in the language of the Constitution. The Supreme Court has articulated that:

> [t]he 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.

Bowers v. Hardwick, 478 U.S. 186, 194 (1986).

[166]Ryan, *supra* note 4, at B5. Dr. Kevorkian sought to challenge Michigan's Supreme Court ruling stating that there was no state or federal constitutional right to PAS. People v. Kevorkian, 527 N.W.2d 714 (Mich. 1994), *cert. denied*, Kevorkian v. Michigan, 115

should be reversed because there is no liberty interest in PAS. If the Court determines that an individual has a liberty interest in PAS, the case should still be reversed because the statute furthers legitimate state interests.[167]

The Second Circuit Court of Appeals, in interpreting the Equal Protection Clause, ruled that no rational basis existed for distinguishing between a death resulting from an omission of unwanted treatment and death resulting from PAS.[168] The court failed to acknowledge that a rational relationship in treating PAS differently from the right of withdrawing treatment does exist. In most withdrawal instances, the discontinuance of treatment occurs in a medical center setting, where recordkeeping is present, witnesses abound, and procedural reviews are apparent.[169] Under the court's decision, without proper legislation which appears mandated by the court's ruling, "a private physician could visit the home of a purportedly terminally ill patient," and end that patient's life through a lethal prescription without the safeguards of a medical center setting.[170]

Further, New York and other states have a compelling interest in protecting all citizens, including terminally ill competent adults. Therefore, the United States Supreme Court should uphold state laws criminalizing assisted suicide. Consequently, states like Washington and New York should be able to criminalize PAS if they so choose.[171] Likewise, because of the deference given to a legislature, the Court should also permit states like Oregon to decriminalize PAS statutes if they so choose.[172] Ergo, *Quill*

S. Ct. 1795 (1995).

[167]*See* Compassion in Dying v. Washington, 79 F.3d 790, 815-16 (9th Cir. 1996) (discussing state interests), *stay granted*, Washington v. Glucksberg, 116 S. Ct. 2494 (1996), *cert. granted*, Washington v. Glucksberg, 65 U.S.L.W. 3085 (U.S. Oct. 1, 1996); *see also supra* note 99 (listing state interests).

[168]Quill v. Vacco, 80 F.3d 716, 178 (2d Cir. 1996), *cert. granted*, 64 U.S.L.W. 3795 (U.S. Oct. 1, 1996).

[169]Harvard Hollenberg, Letter to the Editor, *Assisted Suicide Ruling Criticized*, N.Y.L.J., April 30, 1996, at 2.

[170]*Id.*

[171]*See* Stephen L. Carter, *Point: Whose Death is it?*, PORTLAND OREGONIAN, August 4, 1996, at B01.

[172]Approximately sixty-five years ago, Justice Brandeis recognized the need for states to conduct social and economic legislative experiments. PAS statutes are clearly within the realm of social and economic policies as indicated by the courts' supposed use of a

II[173] should be reversed and *Lee*[174] should be overruled.

V. CONCLUSION

The Supreme Court has recently granted *certiorari* in order to review *Compassion III* and *Quill II* and determine whether a right to PAS exists within the Constitution.[175] The divergence of opinions within the case histories of *Compassion* and *Quill* displays the need for the Court to once again articulate how both the due process and equal protection tests should be applied. Further, *Compassion* and *Quill* could not even agree upon which clause of the Constitution implicitly "creates" a right to PAS. This

---

rational scrutiny. Quill v. Vacco, 80 F.3d 716, 718 (2d Cir. 1996), *cert granted*, 64 U.S.L.W. 3795 (U.S. Oct. 1, 1996); Lee v. Oregon, 891 F. Supp. 1429, 1434 (D. Or. 1995); *see also supra* text accompanying notes 49-57 (discussing the different equal protection reviews). Justice Brandeis states:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

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

[173]The statute at issue in *Quill II* was generally applied to all individuals and should have survived a rational basis review. In New York, PAS was denied to all individuals. N.Y. PENAL LAW §§ 125.15(3), 120.30 (McKinney 1996).

The most articulate criticism of the equal protection analysis applied in *Quill II* is worth quoting:

> In fact, the 2nd Circuit Court has matters precisely backward: If everybody except the terminally ill were allowed to seek the assistance of physicians in suicide, the equal protection claim might have merit.

Carter, *supra* note 171, at B01.

[174]Lee v. Oregon, 891 F. Supp. 1429, 1438 (D. Or. 1995) (discussing "careful scrutiny"); *see supra* note 155 (criticizing the use of "careful scrutiny").

[175]Washington v. Glucksberg, __ S. Ct. __, 65 U.S.L.W. 3085 (U.S. Oct 1, 1996); Vacco v. Quill, __ S. Ct. __, 64 U.S.L.W. (U.S. Oct. 1, 1996). Oral arguments are expected to be heard in January 1997 and a decision from the nation's highest court is expected next summer. Biskupic, *supra* note 165, at A01.

divergence alone provides ground for the Supreme Court to reverse both holdings.

The Supreme Court should realize that the legislative process regarding this "right" is responding to the ongoing debate caused in part by *Compassion, Quill*, and *Lee*. In 1995-96, "right to die" legislation has been introduced in sixteen states.[176] The Supreme Court should allow this ongoing debate to continue within the legislative branches of government. Ironically, at least sixteen states have joined together on a brief asking the United States Supreme Court to overturn the Ninth Circuit's *Compassion III* decision.[177]

Supreme Court Justice Antonin Scalia may have stated it best when he articulated that the "right to die" decision is not a decision for the high court.[178] "'Why would you leave that to nine lawyers for heaven's sake?' asked Scalia. 'It's better to let the people decide.'"[179]

---

[176]Julie Forster, *Proponents of Doctor-Assisted Suicide Hail 9th Circuit's 'Landmark' Decision*, March 11, 1996, *available in*, 1996 WL 259031.

[177]*Several States Join in Supreme Court Brief Seeking to Uphold Assisted Suicide*, Sept. 10, 1996, *available in*, 1996 WL 508257.

[178]Carol J. Castaneda, *Right-to-Die Debate Quickens Legal, Medical and Theological Issues Collide*, USA TODAY, April 5, 1996, at 03A. The current debate is over the right to PAS, although it has been mischaracterized as the "right to die" by courts and commentators alike. *See supra* text accompanying note 8.

[179]*Id.* (quoting Supreme Court Justice Antonin Scalia). "People" in this context refers to a legislative body or citizens directly voting on an issue. *See supra* note 107.