GIVE ME LIBERTY *AND* GIVE ME DEATH: ASSISTED SUICIDE AS A FUNDAMENTAL LIBERTY INTEREST

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Recently, the Second and Ninth Circuit Courts of Appeals held unconstitutional laws that criminalize assisted suicide. The Circuits decided that the terminally ill individual, not the government, should make the choice on whether to hasten death, but the two circuits took different paths to reach this conclusion. The Ninth Circuit analyzed its case as a Fourteenth Amendment liberty interest, establishing an expansive right for doctors, pharmacists and friends to aid terminally ill citizens in their suicides.[1] The Second Circuit, on the other hand, analyzed the case under the Fourteenth Amendment's Equal Protection clause and concluded that if individuals could choose to hasten their deaths by removing life support systems, then terminally ill individuals not requiring such systems should also have the opportunity to choose to hasten their deaths with a physician's assistance.[2] The Supreme Court of the United States agreed to hear these cases.[3] Justice Sandra Day O'Connor, as she frequently does, will likely write a concurring opinion providing the necessary fifth vote to decide the case.[4]

This article is organized in three sections. First it discusses the Ninth Circuit's recent en banc decision in *Compassion in Dying v. Washington* which found a fundamental liberty interest in assisted suicide.[5] Next, this article discusses the Second Circuit's decision in *Quill v. Vacco* and its finding that preventing assisted suicide violates the Fourteenth Amendment's Equal Protection clause.[6] Finally, this article discusses how Justice O'Connor, as the pivotal swing vote on the Supreme Court, will approach these cases. In doing so, the final section considers Justice O'Connor's views regarding liberty, personal dignity, and autonomy as reflected in her concurring opinion in *Cruzan v. Director, Mo. Department of Health*,[7] and her co-authorship of the joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[8]

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[1] *See* Compassion in Dying v. Washington, 79 F.3d 790 (9th Cir. 1996).

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

[3] *See* Washington v. Glucksberg, 117 S. Ct. 37 (1996); and Vacco v. Quill, 117 S. Ct. 36 (1996).

[4] *See* Susan R. Estrich and Kathleen M. Sullivan, *Abortion Politics: Writing For An Audience of One*, 138 U. PA. L. REV. 119 (1989) (discussing Justice O'Connor's centrist approach to abortion in her concurring opinion in Webster v. Reproductive Health Services, 492 U.S. 490 (1989)).

[5] *See Compassion in Dying*, 79 F.3d at 815.

[6] *See Quill*, 80 F.3d at 727.

[7] 497 U.S. 261 (1990).

[8] 505 U.S. 833 (1992). *See* Seth F. Kreimer, *Does Pro-Choice Mean Pro-Kevorkian? An Essay on Roe, Casey, and the Right to Die*, 44 AM. U. L. REV. 803, 832, 834 (1995)

I. *COMPASSION IN DYING V. WASHINGTON*

A. *Factual and Procedural Background*

A Washington statute made it a felony knowingly to assist another in committing suicide.[9] The statute was challenged as a violation of Fourteenth Amendment due process and equal protection rights of the following plaintiffs: three mentally competent terminally ill individuals (now deceased); a group of physicians with terminally ill patients, who sued individually and on behalf of their patients; and Compassion in Dying, a non-profit corporation organized to assist mentally competent terminally ill patients in voluntarily committing suicide.[10] The District Court for the Western District of Washington found both a fundamental right to assisted suicide and a violation of the equal protection interests of terminally ill individuals, not dependent on life support systems.[11] Accordingly, the court granted summary judgment to the terminally ill individuals and the physicians "insofar as [they] purport[ed] to raise claims on behalf of their terminally ill patients."[12] The court denied the motions for summary judgment of both the physicians as individuals and Compassion in Dying.[13] A three judge panel of the Ninth Circuit (hereinafter "the panel") found no constitutional violations and reversed the district court's decision.[14] The panel held that the statute was constitutional under the lowest level of judicial scrutiny - rational basis review.[15] The Ninth Circuit, sitting en banc, (hereinafter "the Ninth Circuit" or "the court") subsequently reversed the decision of the three judge panel.[16] The Supreme Court agreed to hear the case[17] and stayed the Ninth Circuit's decision until the Supreme Court has rendered a decision.[18]

B. *The Ninth Circuit's En Banc Decision*

The Ninth Circuit organized its opinion around two main questions.[19] First, the court examined whether a terminally ill individual has a constitutionally pro-

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(describing Justice O'Connor's concurring opinion as "pivotal").

[9] *See* WASH. REV. CODE § 9A.36.060 (1988).

[10] *See* Compassion in Dying v. Washington, 850 F. Supp. 1454, 1457-58 (W.D. Wash. 1994). *See also* Robert L. Kline, *The Right to Assisted Suicide in Washington and Oregon: The Courts Won't Allow a Northwest Passage*, 5 B.U. PUB. INT. L.J. 213, 216-18 (1995) (detailing the tragic conditions of the patients, the relationships of the doctors to the patients, and the role and philosophy of Compassion in Dying).

[11] *See Compassion in Dying*, 850 F. Supp. at 1454.

[12] *Id.* at 1467.

[13] *See id.*

[14] *See* Compassion in Dying v. Washington, 49 F.3d 586, 588 (9th Cir. 1995). *See* Kline, *supra* note 10, at 219-30 (criticizing the three judge panel's decision).

[15] *See Compassion in Dying*, 49 F.3d at 593.

[16] *See* Compassion in Dying v. Washington, 79 F.3d 790, 839 (9th Cir. 1996).

[17] *See* Washington v. Glucksberg, 117 S. Ct. 37 (1996).

[18] *See* Washington v. Glucksberg, 116 S. Ct. 2494 (1996).

[19] *See Compassion in Dying*, 79 F.3d at 790.

tected liberty interest in hastening his or her death.[20] Second, provided that such an interest exists, the court examined whether the state may restrict exercise of that interest by banning medically assisted suicide.[21] The Ninth Circuit reviewed the Supreme Court's decisions in *Planned Parenthood of Southeastern Pa. v. Casey*[22] and *Cruzan v. Director, Missouri Dep't of Health*,[23] as well as historical and current attitudes toward suicide to find that such a liberty interest existed.[24] After balancing the state's interests against the individual's interests, the court held that the state's absolute prohibition on assisted suicide for mentally competent, terminally ill adults unconstitutionally limited such person's liberty interest.[25] Therefore, the court invalidated the portion of the Washington statute dealing with assisted suicide as it applied to mentally competent terminally ill adults.[26]

1. Finding the liberty interest

The Supreme Court has used two different approaches to define protected liberty interests.[27] One approach examines whether an interest is "implicit in the concept of ordered liberty"[28] or is supported by the history and traditions of our

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[20] *See id.* at 834.

[21] *See id.* at 793-94. The Washington statute in question provided: "A person is guilty of promoting a suicide when he knowingly causes *or aids* another to attempt suicide." WASH. REV. CODE § 9A 36.060 (1988) (emphasis added).

[22] 505 U.S. 833 (1992) (plurality opinion).

[23] 497 U.S. 261 (1990).

[24] *See Compassion in Dying*, 79 F.3d at 816.

[25] *See id.* at 799, 838. The Ninth Circuit, having resolved the case on Due Process grounds, chose not to address the plaintiffs' Equal Protection argument.

[26] *See id. See also id.* at 789 n.9. Since the court used an "as applied" approach, it did not need to address the dispute over the proper standard to apply in a facial challenge to a statute. *See id.* The majority of the three judge panel and the dissent in the en banc opinion both argued that the proper test was set forth in United States v. Salerno, 481 U.S. 739, 745 (1987), which set a very high hurdle in declaring a statute unconstitutional on its face. *See Compassion in Dying*, 79 F.3d at 842; *Compassion in Dying*, 49 F.3d at 591. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S. at 745. This issue has already been resolved in one of Justice Stevens' recent denials of a petition for certiorari. *See* Janklow v. Planned Parenthood, 116 S. Ct. 1582 (1996). Justice Stevens discounted the above quote from *Salerno* as a "rhetorical flourish" and instead focused on the sentence following that quote in *Salerno*: "The fact that [a legislative] Act might operate unconstitutionally under some set of conceivable circumstances is insufficient to render it wholly invalid." *Id.* at 1583 (quoting *Salerno*, 481 U.S. at 745).

[27] *See* Kline, *supra* note 10, at 218-20.

[28] Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (plurality opinion). *See also* Palko v. Connecticut, 302 U.S. 319, 325 (1937) (overruled on other grounds); Snyder v. Massachuetts, 291 U.S. 97, 105 (1934).

nation.[29] The second, more expansive, approach avoids making the Constitution into a "hidebound document" by determining which evolving liberty interests are entitled to constitutional protection.[30] The Ninth Circuit used this second approach and thereby analyzed the liberty protection "in light of existing circumstances as well as our historic traditions."[31]

To aid its analysis, the Ninth Circuit analogized the liberty interest in assisted suicide to the liberty interest of a woman to terminate her pregnancy.[32] Unlike other rights and interests implicitly protected by the Due Process clause, the Ninth Circuit examined both the rights to assisted suicide and abortion on a sliding scale which changes as an individual's medical condition changes.[33] For example, as a pregnancy proceeds, the state's interest in the potential life of a fetus grows until at viability it overshadows the right of a woman to have an abortion.[34] Similarly, as a terminal illness proceeds, the state's interest in preserving that person's life fades.[35] The Ninth Circuit stated that "in right-to-die cases the outcome of the balancing test may differ at different points along the life cycle as a person's physical or medical condition deteriorates, just as in abortion cases the permissibility of restrictive state legislation may vary with the progression of the pregnancy."[36]

The court analyzed the case in the same way as the Supreme Court analyzed *Roe v. Wade*.[37] The *Roe* Court first decided the underlying question of whether a woman has the right to choose to end her pregnancy, before reaching the issue of whether the state's restrictions on medically assisted abortion violated that

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[29] *See* Moore v. East Cleveland, 431 U.S. 494, 503 (1977).

[30] *Michael H.*, 491 U.S. at 141 (Brennan, J., dissenting).

[31] *Compassion in Dying*, 79 F.3d at 800. The court also looked for guidance to Justice Harlan's dissent in Poe v. Ullman.

> The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere in the Constitution . . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement.

367 U.S. 497, 541 (1961).

The court also quoted Justice Brandeis' dissent in Olmstead v. United States, stating that the Founders of the Constitution "sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone — the most comprehensive of rights, and the right most valued by civilized men." 277 U.S. 438, 471 (1928).

[32] *See Compassion in Dying*, 79 F.3d at 800.

[33] *See id.*

[34] *See id.* (citing Roe v. Wade, 410 U.S. 113, 163-65 (1973)). *See also* Kline, *supra* note 10, at 234-35.

[35] *See* Kline, *supra* note 10 at 236.

[36] *Compassion in Dying*, 79 F.3d at 800-01.

[37] *See id.* at 798-99.

right.[38] Likewise, the Ninth Circuit first identified a right to assisted suicide before deciding whether Washington's statute violated that right.[39]

2. Reflecting on *Casey* and *Cruzan*

The Ninth Circuit discussed the Supreme Court's approach to identifying a liberty interest under *Casey* and *Cruzan*.[40] In *Casey*, the Court reviewed its prior holdings on due process liberty rights and interests flowing from the Due Process Clause.[41]

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[42]

The Ninth Circuit placed the right to determine the timing and manner of one's own death among these most intimate and personal choices.[43] "A competent terminally ill adult, having lived nearly the full measure of his life, has a strong liberty interest in choosing a dignified and humane death rather than being reduced at the end of his existence to a childlike state of helplessness, diapered, sedated, incontinent."[44] In describing the horrors of the final stage of a terminal

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[38] *See Roe*, 410 U.S. at 147.

[39] *See Compassion in Dying*, 79 F.3d at 798-99. The court chose to use the terms "right-to-die," "determining the time and manner of one's death," and "hastening one's death" as opposed to the term "suicide." *See e.g., id.* at 793, 800, 802. The court's euphemisms allowed it to avoid the pejorative sense attached to the word suicide. It is ironic that the court shunned the "history and tradition" approach to determining liberty interests but still felt the need to avoid the word "suicide" because of the negative connotation it holds. *See id.* at 800. The court also lumped the act of refusing or terminating unwanted medical treatment into its definition of "right-to-die." *See id.* at 798-99. The court knew that the Supreme Court, in *Cruzan*, had already found a liberty interest in the "right-to-die." Thus, by organizing its definitions, the court finessed the Equal Protection argument it claimed not to address. *See id.* at 838.

[40] *See id.* at 813-16.

[41] *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 846-53 (1992) (reviewing decisions on marriage, procreation, contraception, family relationships, child rearing and education).

[42] *Id.* at 851.

[43] *Compassion in Dying*, 79 F.3d at 813-14. *But see* George J. Annas, *The "Right to Die" in America: Sloganeering From Quinlan and Cruzan to Quill and Kevorkian*, 34 DUQ. L. REV. 875, 893 (1996) (the abortion analogy is misplaced in the assisted suicide context).

[44] *Compassion in Dying*, 79 F.3d at 814. *See also* William Shakespeare, *As You Like It*, Act II, Scene 7 ("All the world's a stage, And all the men and women merely players: They have their exits and their entrances; And one man in his time plays many parts, His acts being seven stages . . . Last scene of all, That ends this strange eventful history, Is

illness, the Ninth Circuit suggested that state infringment on choosing the manner of one's death may have a more profound effect on an individual than state infringement on a woman's choice to terminate her pregnancy.[45]

The Ninth Circuit also sought guidance from *Cruzan*.[46] The court interpreted Chief Justice Rehnquist's majority opinion as holding that an individual has a liberty interest in refusing or terminating unwanted medical treatment.[47] The Ninth Circuit expanded this to include "a liberty interest in hastening one's own death."[48] In doing so, the Ninth Circuit ignored Justice Rehnquist's use of tentative language.[49] The *Cruzan* Court stated, "The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment *may be inferred* from our prior decisions."[50]

The Ninth Circuit attributed the tentative language, and subsequent "confusion" by commentators, to the Supreme Court's vague designation of the ability to refuse medical treatment as either a liberty interest or a liberty right.[51] The Ninth Circuit understood *Cruzan* as distinguishing between liberty rights and liberty interests.[52] A government regulation limiting an individual's liberty *right* will face strict judicial scrutiny.[53] A regulation limiting an individual's liberty *interest,* will be subject to a test balancing the state's interests against the importance of the liberty interest.[54] The Ninth Circuit held that physician assisted suicide was a liberty interest, not a liberty right.[55]

Justice Scalia would undoubtedly object to this interpretation of *Cruzan*. In his concurrence, Justice Scalia rejected the notion that the state could not prevent an

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second childishness and mere oblivion, Sans teeth, sans eyes, sans taste, sans everything.").

[45] *See Compassion in Dying*, 79 F.3d at 814.

[46] *See id.*

[47] *See id.* (citing Washington v. Harper, 494 U.S. 210 (1990) (involving the right against forced medication); Parham v. J.R., 442 U.S. 584 (1979) (involving a child's right against involuntary hospitialization); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (involving the right to refuse vaccination)).

[48] *Id.* at 816. *See also* Annas, *supra* note 43, at 893-94 (criticizing Ninth Circuit's interpretation of Cruzan).

[49] *See* Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 278-279 (1990).

[50] *Id.* (emphasis added). Later in the opinion, the Court found that

> [a]lthough we think the logic of the cases discussed above would embrace such a liberty interest, the dramatic consequences involved in refusal of such treatment *would inform the inquiry* as to whether the deprivation of that interest is constitutionally permissible. *But for purposes of this case, we assume* that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.

Id. at 279 (emphasis added).

[51] *Compassion in Dying*, 79 F.3d at 814-15 n.67.

[52] *See id.*

[53] *See id.* at 849, 855

[54] *See id.*

[55] *See id.* at 798.

individual from choosing to hasten death, even by removing medical treatment.[56] Justice Scalia stated that distinctions between passive and active euthanasia or between natural and assisted means of hastening death were artificial and dangerous.[57] He predicted that the courts would be dragged unnecessarily and dangerously into a moral and political conflict unpleasantly reminiscent of the abortion debate.[58] None of the other Justices joined Justice Scalia's opinion.[59] Indeed, the other eight Justices had varying levels of support for finding a liberty interest, thereby allowing Nancy Cruzan's family to withdraw medical treatment even though it amounted to a conscious decision to hasten a non-imminent death.[60]

C. *Balancing The State and Individual Interests*

After concluding that an interest existed, the Ninth Circuit determined that a balancing test is the proper methodology to apply in physician assisted suicide cases.[61] The test weighs the importance of the individual's liberty interest against the interests of the state.[62] According to the Ninth Circuit's interpretation, Justice Rehnquist used a balancing approach in *Cruzan*.[63] The *Cruzan* Court upheld a Missouri statute requiring clear and convincing evidence that an incompetent individual had previously expressed a desire to have medical treatment cease under certain conditions.[64] Therefore, if Cruzan's family could meet Missouri's standard of proof as to Cruzan's wishes, doctors could then cease the food and

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[56] *See* Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 261, 293 (1990) (Scalia, J., concurring).

[57] *See id.* at 296-97.

[58] *See id.* at 292-93.

[59] *See id.* at 292.

[60] *See* Charles H. Baron, et. al. *Statute A Model State Act to Authorize and Regulate Physician-Assisted Suicide*, 33 HARV. J. ON LEGIS. 1, 15 (1996). *See also Compassion in Dying*, 79 F.3d at 815 n.68; and Kline, *supra* note 10, at 230.

[61] *See Compassion in Dying*, 79 F.3d at 855.

[62] *See id.* at 836-37. The court suggested that the Supreme Court soon abandon the "artificial" two or three tier system of constitutional due process analysis involving strict scrutiny, intermediate scrutiny, and rational basis review. *See id.* According to the Ninth Circuit, the new standard should reflect a continuum where "the more important the individual's right or interest, the more persuasive the justifications for infringement would have to be." *Id.* This echoes Justice Marshall's approach in the Equal Protection and fundamental rights area. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 109 (1973) (Marshall, J., dissenting). "[I]t seems to me inescapably clear that this Court has consistently adjusted the care with which it will review state discrimination in light of the constitutional significance of the interests affected and the invidiousness of the particular classification." *Id.* Justice Marshall's approach was specifically rejected by the majority in that case because it would turn the Court from a judicial body into a "superlegislature." *Id.* at 31 (quoting Shapiro v. Thompson, 394 U.S. 618, 655, 661 (1969)). The more conservative members of the present Court would likely agree.

[63] *See Compassion in Dying*, 79 F.3d at 799. *See also Cruzan*, 497 U.S. at 279.

[64] *See Cruzan*, 497 U.S. at 283-86.

water treatment.[65] Although all acknowledged this would lead to death, the Court still held the Missouri statute constitutional.[66] Justice O'Connor joined the opinion because she determined that there was a liberty interest encompassing the right to remove the tubes supplying Nancy Cruzan with food and water.[67] Thus, the Court balanced Cruzan's individual liberty interest in refusing or withdrawing medical treatment against the state's interest in preventing her death.

The Ninth Circuit set out a series of steps to determine whether the Washington statute violated the plaintiff's liberty interest.[68] The court identified the relevant factors, assessed both the state and individual interests in light of the factors, and then balanced the two interests.[69] The court decided that the

> relevant factors generally include: 1) the importance of the various state interests, both in general and in the factual context of the case; 2) the manner in which those interests are furthered by the state law or regulation; 3) the importance of the liberty interest, both in itself and in the context in which it is being exercised; 4) the extent to which that interest is burdened by the challenged state action; and 5) the consequences of upholding or overturning the statute or regulation.[70]

The Ninth Circuit recognized the varied importance of the State's interests and determined that these factors could not justify limiting an individual's liberty interest.[71] Although, Chief Justice Rehnquist posited in *Cruzan* that the state may assert an unqualified interest in preserving life,[72] the Ninth Circuit found that this state interest is not absolute.[73] The Ninth Circuit held that courts cannot examine the state interest in the abstract without acknowledging the real life pain and tragedy caused by denying a human being his or her rights.[74] The court cited Washington's Natural Death Act which allows terminally ill adults on life support to order such treatment withdrawn.[75] The Washington Legislature made specific findings that people dependent on medical technology could refuse or withdraw such treatment.[76] The legislature's broad language may also include terminally ill individuals not dependent on such technology.[77]

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[65] *See id.* at 283. On remand, attorneys for Nancy Cruzan provided clear and convincing evidence of her desire to terminate treatment. The nutrition and hydration tubes were removed and she died shortly thereafter. *See Compassion in Dying*, 79 F.3d at 824 n.97.

[66] *See Cruzan*, 497 U.S. at 283-86.

[67] *See id.* at 281.

[68] See *Compassion in Dying*, 79 F.3d at 816-17.

[69] *See id.*

[70] *Id.*

[71] *See id.* at 837.

[72] *See Cruzan*, 497 U.S. at 282.

[73] *See Compassion in Dying*, 79 F.3d at 820.

[74] *See id.*

[75] *See id.* at 817 (citing WASH. REV. CODE § 70.122.030 (1991)).

[76] *See* WASH. REV. CODE § 70.122.010.

[77] *See id.*

The legislature finds that adult persons have the fundamental right to control the de-

The Ninth Circuit observed that no meaningful distinction exists between permitted medical practices that hasten death and the prohibited medical practice of physician assisted suicide.[78] Physicians can and do assist patients by removing life support technology and by providing increasing dosages of medication that "manage pain" while also producing the anticipated "secondary effect" of death.[79] Yet physicians may not assist a terminally ill, mentally competent patient in securing the means to end the patient's suffering.[80] Washington argued that physician assisted suicide actively involves the doctor in causing death, whereas removing life support is passive acceptance of death.[81] This argument is not convincing because doctors must actively disconnect life support technology, knowing that this action will lead to death.[82] Thus, Washington could not claim an unqualified interest in preserving life because it already allowed some patients to hasten their death.[83]

The state also argued that removing technology allows nature to take its course.[84] The court rejected this argument because the underlying disease does not cause death; rather, starvation and thirst do.[85] The Ninth Circuit reasoned that if these other means of allowing patients and their physicians to hasten death are legally and ethically acceptable, then physician assisted suicide is likewise acceptable.[86] The Ninth Circuit stated that "what matters most is that the

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cisions relating to the rendering of their own medical care, including the decision to have life-sustaining procedures withheld or withdrawn in instances of terminal condition. The legislature further finds that modern medical technology has made possible the artificial prolongation of human life beyond natural limits. The legislature further finds that, in the interest of protecting individual autonomy, such prolongation of life for persons with a terminal condition may cause loss of patient dignity, and unnecessary pain and suffering, while providing nothing medically necessary or beneficial to the patient.

Id.

[78] *See Compassion in Dying*, 79 F.3d at 828.

[79] *Id. But see* Annas, *supra* note 43, at 895 (arguing that secondary effects are legal and good medical care—it is all that the plaintiffs in *Compassion in Dying* and *Quill* wanted or required).

[80] *See Compassion in Dying*, 79 F.3d at 794.

[81] *See id.* at 822.

[82] *See id.*

[83] *See id.*

[84] *See id.* at 822-23.

[85] *See id.*

[86] *See id.* at 824.

[W]e see little, if any, difference for constitutional or ethical purposes between providing medication with a double effect and providing medication with a single effect, as long as one of the known effects in each case is to hasten the end of the patient's life. Similarly, we see no ethical or constitutionally cognizable difference between a doctor's pulling the plug on a respirator and his prescribing drugs which will permit a terminally ill patient to end his own life.

Id.

death of the patient is the intended result as surely in one case as in the other."[87] This echoes Justice Scalia's *Cruzan* concurrence.[88] Although Scalia and the Ninth Circuit reach different conclusions, both agree there is little difference between so-called active and passive suicide.[89]

The Ninth Circuit recognized the State's clear interest in preventing suicide based on "desperation, depression, or loneliness or as a result of any other problem, physical or psychological, which can be significantly ameliorated."[90] The court implied that doctors should treat terminally ill patients suffering from clinical depression, and deny them the right to assisted suicide.[91] This problem was not relevant in the present case because the plaintiffs were stipulated to be mentally competent.[92] Thus, since mental disease or depression was not a factor, the state interest did not apply.[93]

The Ninth Circuit criticized the three judge panel's findings concerning minorities and the poor.[94] The panel feared that society would force minorities and the poor to commit suicide in disproportionate numbers.[95] This fear is based on the fact that people without health care often do not have access to treatment, pain relief options, and psychological counseling.[96] The Ninth Circuit scoffed at the notion that the health care system will deny disadvantaged persons treatment throughout their lives, but will fully fund health programs for poor people to commit suicide.[97]

The Ninth Circuit did, however, consider the role medical costs may play in terminally ill patients' decisions.[98] The court suggested that the failure to provide adequate health care to all citizens does have a financial impact on decision making.[99] Terminally ill individuals may feel pressure to seek physician-assisted suicide because of the enormous financial burdens that medical care places on their survivors.[100] "[W]e are reluctant to say that, in a society in which the costs of protracted health care can be so exorbitant, it is improper for competent, terminally ill adults to take the economic welfare of their families and loved ones

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[87] *Id.*

[88] *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 296-97 (1990).

[89] *See id.* (Scalia. J. concurring) (quoting 4 William Blackstone, COMMENTARIES 189) ("the action-inaction distinction [is irrelevant] . . . Starving oneself to death is no different from putting a gun to one's temple as far as the common-law definition of suicide is concerned; the cause of death in both cases is the suicide's conscious decision to 'pu[t] an end to his own existence' ").

[90] *Compassion in Dying*, 79 F.3d at 820.

[91] *See id.* at 821.

[92] *See id.* at 794-95.

[93] *See id.* at 820.

[94] *See id.* at 825.

[95] *See id.*

[96] *See id.*

[97] *See id.*

[98] *See id.* at 826.

[99] *See id.*

[100] *See id.*

into consideration."[101] Although it may be shocking that financial considerations play a role in deciding whether to end one's life, it is not an irrational basis for such a decision. Ultimately, health care reform is a political debate best left to the political branches, and individuals should not suffer while Congress equivocates.[102]

The court also addressed the issue of undue influence and concluded that it already existed in life support termination situations.[103] State legislatures implement regulations and procedural safeguards to prevent undue influence in life support termination; likewise the legislature may also prevent undue influence in assisted suicide decisions.[104] In fact, the danger of undue influence may be greater in many life support removal situations because the patient is not necessarily terminally ill.[105] Knowledge that the terminally ill individual is close to death may lessen motivation for anyone to exert undue influence.[106] The Ninth Circuit, nevertheless, recognized that no system is foolproof and that safeguards cannot wholly eliminate the danger.[107] The court stated that concerns regarding undue influence "are of more than minimal weight and, in balancing the competing interests, we treat them seriously."[108]

The court also addressed the legitimate state interest in protecting the integrity of the medical profession.[109] The court asserted that the real danger to a physician's integrity lay in prohibiting conduct that many physicians already engage in confidentially at their patient's request.[110] In addition, the doctor-patient relationship suffers when a doctor cannot speak openly about a practice in which many engage.[111] The court also stated that allowing physicians to administer drugs with the "dual effect" of relieving suffering and hastening death has not caused an ethical problem for the medical profession.[112]

Opponents of physician assisted suicide use a "slippery slope" argument to claim that once the bright line of prohibition is crossed, there is no logical stop-

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[101] *Id.*

[102] *See* Baron, *supra* note 60, at 20 n.80 ("We believe that if society fails to meet its moral obligation to provide appropriate health care and other services to all its citizens, it cannot justifiably deny individuals relief from conditions that they find all the more unbearable because of society's moral failure.").

[103] *See Compassion in Dying*, 79 F.3d at 826. *See also* Kreimer, *supra* note 8, at 816 (prohibiting assisted suicide as an option relieves patients of having to justify continued living); and at 822-23 (discussing euthanasia in the Netherlands, where removing absolute prohibition on assisted suicide invites pressure on individual to commit suicide).

[104] *See Compassion in Dying*, 79 F.3d at 826-27, 833.

[105] *See id.* at 826.

[106] *See id.*

[107] *See id.* at 827.

[108] *Id.*

[109] *See id.*

[110] *See id.* at 827-28.

[111] *See id.* at 830.

[112] *Id.* at 828.

ping point.[113] Opponents argue society will ultimately coerce or force its "less desirable" members to premature deaths.[114] The Ninth Circuit responded by asserting that the possible abuse of a right does not deny the right's existence; any right may be taken to an illogical extreme.[115] The Constitution would prevent such a result because it protects the liberties of all citizens from government intrusion.[116] To the Ninth Circuit, the crucial consideration was the voluntariness of the individual's decision.[117] The government may not force a mentally competent, terminally ill person to remain alive involuntarily. Likewise, the government may not force people to take their own lives involuntarily.

The government has another safeguard against the gradual, but limitless expansion of the right to assisted suicide.[118] Even if physician assisted suicide is a fundamental right, the government may regulate if such regulation is necessary to protect a compelling governmental interest.[119] The government's interest in preserving life is is among the primary reasons for the institution of government. Thus, anything short of prohibition on access to physician assisted suicide would frustrate the state's goal of preserving the life of its citizens.

Nevertheless, there is one exception to the state's compelling interest in preserving life. In *Cruzan*, the Supreme Court implicitly recognized that as an individual nears death, the state's interest in preserving that life wanes because there is little life left to preserve.[120] When balancing the state interest in preserving life with the liberty interest of the terminally ill individual to relinquish that life, the ultimate decision must rest with the individual. As in *Casey*, this matter involves "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy."[121]

The Ninth Circuit weighed the strength of the state's interests and the method of accomplishing those interests against the individual's liberty interest.[122] Although the court held that Washington could regulate the liberty interest, it decided that Washington's prohibition on assisted suicide placed too great a hurdle in the path of terminally ill individuals.[123] While physically healthy suicidal individuals (the group whose lives the state has the greatest interest in preserving) still have the capability to commit suicide, the terminally ill are often unable to

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[113] *See id.* at 830.

[114] *Id.*

[115] *See id.* at 831.

[116] *See* U.S. CONST amend. V; XIV, § 1.

[117] *See Compassion in Dying*, 79 F.3d at 832.

[118] *See* Kline, *supra* note 10, at 283.

[119] *See id.*

[120] *See* Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 270 (1990). *See also* Superintendent of Belchertown v. Saikewicz, 370 N.E.2d 417, 425 (Mass. 1977). *See generally*, Kline, *supra* note 10, at 235.

[121] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992).

[122] *See Compassion in Dying*, 79 F.3d at 832-33.

[123] *See id.*

hasten their death without assistance.[124] Many are confined to bed, physically unable, or not strong enough to end their suffering unaided.[125] On a practical level, the absolute ban on physician assistance is an absolute denial of the terminally ill individual's liberty interest.[126]

Justice O'Connor specifically indicated in her *Cruzan* concurrence that the language and degree of regulation or safeguard should be worked out in "the laboratory of the states."[127] In *Compassion in Dying*, the Ninth Circuit cited model and existing state statutes to demonstrate possible regulations.[128] The Ninth Circuit, however, potentially undermined the safeguard provisions in these statutes by extending the protection of the assisted suicide provisions from doctors to pharmacists, health care workers, family members, loved ones, and other helpers.[129] Although the court required these other assisters to "act under the supervision or direction of a physician,"[130] the potential for abuse would increase with every step away from the doctor's oversight. Apparently, the court sought to prevent hostile legislatures from finding a way to criminalize assistance while avoiding the court's discussion of physicians and the terminally ill. The court's preemptive move was too broad as it would insulate everyone who assists in a suicide without providing the safeguards of a trained third party to check the potential of undue influence on the terminally ill individual. The government, however, could require a certification training program for those who help terminally ill individuals commit suicide.[131]

After balancing the various interests, the Ninth Circuit concluded that

> the weight we give all the . . . state's interests, is insufficient to outweigh the terminally ill individual's interest in deciding whether to end his agony and suffering by hastening the time of his death with medication prescribed by his physician. The individual's interest in making that vital decision is compelling indeed, for no decision is more painful, delicate, personal, important, or final than the decision how and when one's life shall end.[132]

As a result of the court's decision that the choice of how and when one dies is a liberty interest, Washington may not ban assisted suicide in the case of termi-

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[124] *See id.* at 832.

[125] *See id.*

[126] *See id.*

[127] Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 292 (1990) (O'Connor J., concurring).

[128] *Compassion in Dying*, 79 F.3d at 832-33. *See also* Kline, *supra* note 10, at 233 n.167 (regarding safeguards approved by the Supreme Court in *Casey* using an undue burden standard and the applicability of such safeguards to regulation in the assisted suicide context).

[129] See *Compassion in Dying*, 79 F.3d at 838 n.140.

[130] *Id.*

[131] "Obitiatrist" is one term coined for the professional providing this service. *See* Quill v. Vacco, 80 F.3d 716, 731 n.4 (2d Cir. 1996).

[132] *Compassion in Dying*, 79 F.3d at 837.

nally ill, competent adults.[133] The court struck the "or aids" provision of the statute as applied to those individuals.[134] In response to those who argued that the courts should not interfere in the decision making process, the Ninth Circuit stated that no branch of government should interfere with such a personal decision.[135] The court characterized itself not as interfering, but rather as preventing the legislature from interfering.[136] The Ninth Circuit's holding removes government interference and places the decision with the proper party: the individual.

D. *Judge Beezer's Dissent*

Judge Beezer dissented from the court's opinion stating that, "[a] patient has a nonfundamental constitutionally protected liberty-based right to refuse or withdraw life-sustaining treatment, including respirators and artificial nutrition and hydration."[137] Furthermore, Judge Beezer stated that "mentally competent, terminally ill adults do have an autonomy-based, nonfundamental liberty interest in committing physician-assisted suicide."[138] Judge Beezer concluded that the proper demarcation line lay between the already recognized right of freedom from unwanted intrusions and situations where individuals need the assistance of others to produce death.[139]

Although the dissent agreed that *Casey* permitted a sweeping description of liberty, Judge Beezer presented three reasons why no fundamental liberty interest existed in physician assisted suicide.[140] First, the dissent pointed to the Supreme Court's historical unwillingness to find new fundamental rights.[141] Second, the dissent distinguished *Casey* from physician assisted suicide, because, in the dissent's view, the Supreme Court limited the *Casey* decision to the abortion context[142] and, the uniqueness of abortion.[143] Third, the dissent noted that the Court decided *Casey* on stare decisis instead of vindicating the abortion right on its own merits.[144] Furthermore, the dissent criticized the majority's approach, opining that a literal reading of the court's broad language unconstitutionally and unwisely grants limitless power to the judiciary.[145]

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[133] *See id.*

[134] *See id.*

[135] *See id.* at 839.

[136] *See id.*

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

[138] *Id.* at 848.

[139] *See id.* at 840.

[140] *See id.* at 849.

[141] See *id.*

[142] *See id.* at 849.

[143] *See id.* at 848. *See also* Planned Parenthood of Southeastern Pa. v. Casey 505 U.S. 833, 853 (1992) ("the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of stare decisis").

[144] *See Compassion in Dying*, 79 F.3d at 848.

[145] *See id.* at 850.

In finding a nonfundamental liberty interest in physician assisted suicide, the dissent focused on *Casey's* language regarding personal dignity.[146] The dissent drew an analogy to the concept of fetal viability.[147] Fetal viability determines the point at which the state's interest outweighs the individual's liberty interest to choose to terminate a pregnancy.[148] For example, a person on life support is essentially as nonviable as a fetus in the initial months of pregnancy because neither can live on their own.[149] On the other hand, a terminally ill person, not on life support, *is* viable because he or she can live without assistance.[150] This implicates the state's interest in preservation of life in a way a person on life support does not.[151] Judge Beezer's reasoning failed to take into account, however, that in *Casey* the Court used a viability line to balance the state's interest in the potential life of the fetus against the woman's autonomy.[152] Once the fetus is viable outside the womb, the state's interest surpasses a woman's right to autonomy because the state must preserve a potential life incapable of protecting itself.[153] In the case of physician assisted suicide, a court must balance the ever-diminishing life of a terminally ill individual "inexorably approaching the line of non-viability"[154] against the individual's liberty interest in making a highly personal decision about his or her life. There is a stark contrast between the state interest in a woman deciding to terminate a potential life of another and the state interest in a terminally ill adult, whose potential days are limited regardless of state action, deciding to end his or her own life.

Additionally, the dissent applied the wrong test.[155] In *Casey* and *Cruzan* the Supreme Court employed balancing tests with a heightened level of scrutiny that did not reach the level of strict scrutiny.[156] These tests were not as deferential as the rational relation test.[157] Although Judge Beezer's dissent acknowledged that the Supreme Court in *Cruzan* employed a balancing test,[158] he still employed a two-tier approach.[159] According to Judge Beezer the court should examine restrictions on fundamental rights with strict scrutiny, but for anything other than a fundamental right the court should examine restrictions using the rational rela-

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[146] *See id.*

[147] *See id.* at 851.

[148] *See id.*

[149] *See id.*

[150] *See id.*

[151] *See id.*

[152] *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 870 (1992). *See also* Roe v. Wade, 410 U.S. 113, 160-64 (1973).

[153] *See id.* at 162-64.

[154] *Compassion in Dying*, 79 F.3d at 851.

[155] *See id.* at 855.

[156] *See* Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 280-84 (1990); and *Casey*, 505 U.S. at 871, 876.

[157] *See Cruzan*, 497 U.S. at 280-84; and *Casey*, 505 U.S. at 871, 876.

[158] *See Compassion in Dying*, 79 F.3d at 855 n.21 (Beezer, J., dissenting) (citing *Cruzan* 497 U.S. at 278-79).

[159] *See id.* at 855.

tion test.[160] The Supreme Court did not apply the deferential rational relation test in *Cruzan*[161] or in *Casey*.[162]

Finally, Judge Beezer's analysis of the proper level of scrutiny contains a contradiction. The dissent discussed at length how physician assisted suicide is a nonfundamental liberty interest.[163] Yet he also stated that "[t]o the extent that *Casey* defines the outer limit of the Constitution's nonfundamental liberty right, it can plausibly be said to include decisions about the manner and timing of one's death."[164] The dissent therefore placed physician assisted suicide in the same category as the liberty interest in abortion. In *Casey*, regulation of the abortion right received a heightened level of scrutiny under the undue burden test.[165] Under the dissent's approach, regulation of the liberty interest in physician assisted suicide should receive the same level of scrutiny. Yet, the dissent relegated the fundamental liberty interest of physician assisted suicide to the same level of rational basis review as a liberty interest in jaywalking or not wearing a motorcycle helmet.[166] The dissent afforded physician assisted suicide a special status, but then gave state curtailment of that special interest only the most pedestrian review.[167] Instead, the court should employ a balancing test weighing the individual's autonomy in a highly personal decision against the state's interest in preserving that individual's life.

III. *QUILL V. VACCO*

A. *Introduction*

In *Quill V. Vacco*[168] the Second Circuit Court of Appeals struck down New York's law criminalizing assisted suicide.[169] Doctors Timothy Quill, Samuel C. Klagsburn, and Howard A. Grossman, physicians threatened with prosecution under the law,[170] challenged the ban on assisted suicide as violating the equal

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[160] *See id.*

[161] *Cruzan*, 497 U.S. at 280-84.

[162] *Casey*, 505 U.S. at 869-78.

[163] *See Compassion in Dying*, 79 F.3d at 847-50 (Beezer, J., dissenting).

[164] *Id.* at 850.

[165] *See Casey*, 505 U.S. at 876.

[166] *See Compassion in Dying*, 79 F.3d at 855.

[167] *See id.*

[168] 80 F.3d 716 (2d Cir. 1996).

[169] *See Quill*, 80 F.3d at 719. Section 125.15 of the New York Penal Code provides in pertinent part "A person is guilty of manslaughter in the second degree when: . . . 3. He intentionally . . . aids another person to commit suicide." N.Y. PENAL LAW § 125.15 (McKinney 1987 & Supp. 1997). Section 120.30 of the New York Penal Code provides "A person is guilty of promoting a suicide attempt when he intentionally . . . aids another person to attempt suicide." N.Y. PENAL LAW § 120.30 (McKinney 1987 & Supp. 1997).

[170] *See Quill*, 80 F.3d at 719. The court found that the physicians had standing to raise the constitutional rights of their patients because of the close doctor-patient relationship, and the patients' inability to live long enough to assert their own rights through the legal

protection and due process clauses of the Fourteenth Amendment.[171] The Second Circuit found no fundamental right to suicide, but held that the statute violated the Equal Protection clause of the Fourteenth Amendment.[172] The court reasoned that if the state permitted individuals on life support to refuse or terminate life support systems, then the state should permit mentally competent, terminally ill individuals, not on life support, to make similar decisions.[173]

B. *The Liberty Interest Is Not Found in* Quill v. Vacco

In determining whether the Constitution implicitly protects assisted suicide as a fundamental right, the *Quill* court took a less expansive approach than the *Compassion in Dying* court. The Second Circuit asked whether the asserted right was "implicit in the concept of ordered liberty" or "deeply rooted in the nation's history and traditions."[174] The court determined that since there exists a long Anglo-American history of prohibiting suicide, assisted suicide is not a part of our history or tradition.[175] In addition, the court noted that a lower court should not create new fundamental rights since the Supreme Court is reluctant to do so.[176] Accordingly, the Second Circuit rejected the Ninth Circuit's reasoning in *Compassion in Dying*, and held that no fundamental liberty interest in assisted suicide exists.

C. *The Equal Protection Challenge*

Under the Equal Protection clause of the Fourteenth Amendment, laws must treat similarly situated individuals as equals.[177] Depending on the goals and classifications of a statute, a court may apply one of three tests.[178] Courts use strict scrutiny to examine statutes with racial or ethnic classifications.[179] In cases of gender and illegitimacy classifications, the court employs intermediate scru-

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appeals process. *See id.* at 722-23. In fact, Quill had previously had a criminal matter instituted against him on a similar matter. *See id.* The case was ripe because the threat of prosecution was real even though no prosecution had been instituted as yet. *See id.* "When contesting the constitutionality of a statute, it is not necessary that the plaintiff first expose himself to actual prosecution." *Id.* (citing Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979)). *See also* Doe v. Bolton, 410 U.S. 179, 188 (1973).

[171] *See Quill*, 80 F.3d at 718.

[172] *See id.* at 727-28.

[173] *See id.* at 729.

[174] *Id.* at 723 (quoting Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)).

[175] *See id.* at 724. *See also* Bowers v. Hardwick, 478 U.S. 186, 192 (1986) (examining the historical and traditional prohibition of sodomy and determining that no fundamental right to homosexual sodomy exists).

[176] *See Quill*, 80 F.3d at 724.

[177] *See id.* at 725.

[178] *See id.* at 726-27.

[179] *See id.*

tiny.[180] The court uses the lowest level of scrutiny, rational basis review, for social welfare legislation.[181] Because terminally ill patients are not a suspect classification in the same sense as classifications based on race, ethnicity, gender or illegitimacy, and because the court had already determined that assisted suicide was not a fundamental right,[182] it chose to use rational basis review.[183]

The court found that New York State case law and statutes[184] provided a right to refuse or discontinue medical treatment, even if the patient's death would result.[185] Additionally, the court interpreted *Cruzan* to provide an individual the right to refuse unwanted medical treatment.[186] The court found no meaningful distinction between those individuals on life support and those individuals who were terminally ill.[187] As in *Compassion in Dying*, the crucial element was the individual's conscious decision to end his or her own life.[188] The Second Circuit stated that ending life by removing life support systems "is nothing more nor less than assisted suicide. It simply cannot be said that those mentally competent, terminally ill persons who seek to hasten their death but whose treatment does not include life support are treated equally."[189]

Having found unequal treatment of similarly situated individuals, the *Quill* court next examined whether the state had a rational reason for such disparate treatment.[190] The court found no reason to justify state-forced prolongation of an individual's life, where that life is near its end.[191] The state's asserted interest in

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[180] *See id.*

[181] *See id.*

[182] *See id.* at 724.

[183] *See id.* at 726.

[184] *See* N.Y. PUB. HEALTH LAW § 2960-79 (McKinney 1993) (competent adult may direct doctors to not resuscitate); N.Y. PUB. HEALTH LAW § 2980-94 (McKinney 1993) (providing for health care proxy appointing an agent to make medical decisions if patient is incompetent, including decisions "to withdraw or withhold life-sustaining treatment").

[185] *See Quill*, 80 F.3d at 727-28.

[186] *See id.* at 728.

[187] *See id.* at 721 (quoting Dr. Quill's Supplemental Declaration) ("It seems unfair, discriminatory, and inhumane to deprive some dying patients of such vital choices because of arbitrary elements of their condition which determine whether they are on life-sustaining treatment that can be stopped.").

[188] Justice Scalia's *Cruzan* concurrence meant to decry the removal of life support systems as prohibited suicide. *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 295 (1990). He vigorously argued that no distinction existed between active and passive suicide. *See id.* The Second Circuit, after interpreting *Cruzan* to allow the removal of life support systems, cited Scalia and agreed there is no distinction. *See Quill*, 80 F.3d at 729 (citing *Cruzan*, 497 U.S. at 296-97 (Scalia, J., concurring)). Since the government permits the removal of life support, and there is no rational distinction between the two sets of patients, then the government must also allow physician assisted suicide in order to treat similarly situated individuals as equals. *See id.*

[189] *Quill*, 80 F.3d at 729. *But see* Annas, *supra* note 43 at 894-95 (criticizing the court's failure to recognize the "moral distinction between an act or an omission").

[190] *See Quill*, 80 F.3d at 729-31.

[191] *See id.* at 730.

the preservation of life diminishes as inevitable death approaches.[192] The rationales for prohibiting assisted suicide apply equally to the removal of life support systems.

> Physicians do not fulfill the role of 'killer' by prescribing drugs to hasten death any more than they do by disconnecting life-support systems. Likewise, 'psychological pressure' can be applied just as much upon the elderly and infirm to consent to withdrawal of life-sustaining equipment as to take drugs to hasten death . . . . With respect to the protection of minorities, the poor and the non-mentally handicapped, it suffices to say that these classes of persons are entitled to treatment equal to that afforded to all those who now may hasten death by means of life-support withdrawal.[193]

Yet, the state prevented assisted suicide and allowed withdrawal of life support without explanation. Once the Supreme Court, and the New York legislature, allowed individuals to choose to hasten death by discontinuing life support systems, then the Equal Protection clause requires that mentally competent, terminally ill individuals may choose to hasten their deaths as well.[194] The court held that none of the asserted state interests were rationally related to the New York legislature's distinction between unplugging a machine to hasten death, and prescribing drugs to assist with a person's suicide.[195]

D. *Judge Calabresi's Concurring Opinion*

Judge Calabresi's concurrence proposed a novel resolution to this issue.[196] His concurring opinion followed the American judiciary's tradition of avoiding constitutional decisions when a narrower basis of decision exists.[197] Thus, he did not decide the Due Process and Equal Protection constitutional questions.[198] Instead, he stated that the court should strike down the statutes because the legislative rationale behind them has no relationship to their modern applications.[199]

The concurring opinion traced the history of the assisted suicide statutes and showed how the view that suicide itself was a crime prompted the criminalization of assisted suicide.[200] Since then, the New York legislature decriminalized suicide, keeping with the modern view that states should not punish suicide as a crime, but should treat it as a mental or emotional problem.[201] New York case

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[192] *See id.*

[193] *Id.*

[194] *See id.* at 731.

[195] *See id.*

[196] *See id.* at 731-43.

[197] *See id.* at 738-41.

[198] *See id.* at 732.

[199] *See id.* at 732-35.

[200] *See id.* at 732 (quoting Breasted v. Farmers' Loan & Trust Co., 4 Hill 73, 75 (N.Y. Sup. Ct. 1843)) ("The statutes at issue were born in another age . . . . This prohibition [of assisted suicide] was tied to the crime of suicide, described by one contemporary New York Court as a 'criminal act of self destruction.' ").

[201] *See id.* at 733. The Legislature did not amend the assisted suicide law at the time

law permits the withdrawal and refusal of life-support, while New York statutes provide procedures for orders not to resuscitate, and for the appointment of health care proxies.[202] Judge Calabresi concluded that "1) what petitioner's seek is nominally still forbidden by New York statutes; 2) the bases of these statutes have been deeply eroded over the last hundred and fifty years; and 3) few of their foundations remain in place today."[203] He opined that although the statutes are "highly suspect" under the Due Process and Equal Protection clauses, there is nothing that makes them clearly unconstitutional.[204] He struck them down, however, because the state had abandoned the policies of the statutes years before.[205]

IV. JUSTICE O'CONNOR ON LIBERTY

Justice O'Connor's opinions on liberty provide insight into how she will navigate a center course between the Ninth Circuit's expansive approach, and the restrictive approach advocated by Justice Scalia in *Cruzan*. This section will focus on Justice O'Connor's opinions in *Casey*,[206] *Cruzan*,[207] and *Michael H. v. Gerard D.*[208] If Justice O'Connor wants to uphold the statutes she has two choices. She may adopt the Second Circuit's Equal Protection approach. Alternatively, Justice O'Connor may find that the individual, not the state, has the right to control personal and intimate decisions. Regardless of which approach she takes, her decision will include the state in the process because the state has a compelling interest in preserving life.

Justice O'Connor's opinion in *Cruzan* has two main themes.[209] First, the Court must prevent the government from violating an individual's bodily integrity.[210] Second, the Court should seek to preserve individual decisional privacy where the government burdens an individual's choice on intimate and personal matters relating to an established constitutional right or liberty interest.[211]

Justice O'Connor relied, as to the first theme, on cases preventing government

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that it amended the other suicide laws. *See id.* at 734 n.6 ("Why the legislature left the prohibition of assisted suicide in the law, and whether it thought about the issue at all is hard to say.").

[202] *See id.* at 734.

[203] *Id.* at 735.

[204] *Id.* at 738.

[205] *See id.* at 740.

[206] 505 U.S. 833, 843 (1992) (joint opinion establishing the undue burden test in the abortion context).

[207] 497 U.S. 261, 287 (1990) (concurring opinion recognizing the right to refuse consent for medical treatment, including nutrition and hydration in the definition of "medical treatment").

[208] 491 U.S. 110, 132 (1989) (concurring in judgment, but specifically rejecting Justice Scalia's restrictive approach to constitutional interpretation).

[209] *See Cruzan*, 497 U.S. at 287-99.

[210] *See id.* at 287-89.

[211] *See id.* at 289.

intrusion.[212] These cases involved patients who withheld medical consent and on cases where the government, in pursuit of evidence of criminal wrong-doing, seriously invaded the individual's physical presence.[213] In *Cruzan*, Justice O'Connor concluded that the government cannot force treatment, not even the nasogastric tubes at issue in *Cruzan*.[214] Without the nasogastric tubes, Nancy Cruzan would have died of thirst or hunger.[215] Courts have described this approach as "letting nature take its course."[216] In refusing or removing treatment, "letting nature taking its course" is really a conscious decision to forgo suffering and hasten death.[217] Thus, under certain circumstances, the government must let some people die if they so choose. The individual need only show that he or she wants to forgo or remove medical treatment; the government must honor that desire and allow death to occur. Justice O'Connor's opinion that the government should not violate an individual's bodily integrity applies to assisted suicide as well. The government interest in preserving life is not strong enough to permit the government either to invade an individual's bodily integrity or to force an individual to suffer involuntarily the pain and indignity of the final stages of a terminal illness.

The second of Justice O'Connor's *Cruzan* themes, decisional privacy, involves the right of the individual to make intimate and highly personal decisions without the state imposing its will.[218] In *Cruzan*, O'Connor wrote that

> [r]equiring a competent adult to endure such procedures [i.e., painful nasogastric tubes] against her will burdens the patient's liberty, dignity and freedom to determine the course of her own treatment. Accordingly, the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's *deeply personal decision* to reject medical treatment, including the artificial delivery of food and water.[219]

The state may not impose its view of morality on an individual's deeply personal decisions. Even where a surrogate must exercise the individual's will, O'Connor signaled her willingness to let individuals, rather than the state, resolve intimate matters.[220]

Justice O'Connor's opinion in *Cruzan* foreshadowed the *Casey* opinion, which

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[212] *See id.* at 287-88.

[213] *See* id. at 287 (citing Rochin v. California, 342 U.S. 165, 172 (1952); Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891)).

[214] *See id.* at 289.

[215] *See id* at 267-68.

[216] *See* Superintendent of Belchertown v. Saikewicz, 370 N.E.2d 417, 423 (Mass. 1977).

[217] *See* Annas, *supra* note 43 at 896 (criticizing characterization of nasogastric tube removal as suicide by starvation using the analogy that failure to use cardiopulmonary resuscitation (CPR) is committing suicide "by intentionally stopping the heartbeat").

[218] *See* Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); and Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[219] *Cruzan*, 497 U.S. at 289 (emphasis added).

[220] *See id.*

she co-authored with Justices Souter and Kennedy.[221] In *Casey*, Justice O'Connor expansively defined liberty as involving "the most intimate and personal choices . . . choices central to personal dignity and autonomy."[222] The Court in *Casey* did not interpret the Constitution as a document stuck in time, limited to an eighteenth century understanding of the world.[223] Instead, the Court asserted that the framers of the Constitution purposely chose flexible language because they intended it as a document for the future, as well as the moment.[224]

Justice O'Connor voiced this view not just in *Casey*, but also in her concurring opinion in *Michael H.*[225] Although she joined Justice Scalia's opinion that courts should not use heightened scrutiny for an alleged liberty interest of a "natural father . . . vis-a-vis a child whose mother is married to another man,"[226] she explicitly disagreed with footnote six, positing that courts should decide constitutional questions using the most specific level of inquiry.[227] Instead, Justice O'Connor recognized that history and tradition were constitutional guideposts, not institutional boundaries.[228] If Justice O'Connor follows the more expansive approach to constitutional interpretation found in *Casey* and *Michael H.* she will not limit herself to a narrow historical focus on society's view of suicide.

In *Casey* and *Cruzan*, the two cases most analogous to the assisted suicide cases, O'Connor recognized the state's important role in preserving life.[229] Nonetheless, she supported an individual's interest in dignity and autonomy as opposed to the state's interest in coercively preserving life.[230] One may argue that the state does not compel the individual to *do* anything when the state prevents physicians from prescribing drugs to hasten death. The argument is that the state is preventing action, not compelling it. Yet to a pain-racked, terminally ill individual eagerly awaiting death to relieve suffering, the state is indeed forcing its will on the individual. The threat of state sanctions forces an individual, against his or her will, to endure the final days of pain and indignity.

The lifting of criminal sanctions on physician assisted suicide for mentally

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[221] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).

[222] *Id.* at 851. *See* Kline, supra note 10, at 222-23 (regarding level of generality).

[223] *See Casey*, 505 U.S. at 847-48.

[224] *See id.* at 850 (quoting Poe v. Ullman, 367 U.S. 497, 592 (Harlan, J., dissenting)). Justices Stevens and Blackmun took a more expansive approach than the joint opinion. *See id.* at 911, 922. Therefore, five justices saw the Constitution as embracing a flexible concept of liberty.

[225] *See* Michael H v. Gerald D., 491 U.S. 110, 132 (1989).

[226] *Id.* at 127-28 n.6.

[227] *See id.* at 132.

[228] *See id.*

[229] *See Casey*, 505 U.S. at 871; and Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 292 (1990).

[230] *See Casey*, 505 U.S. at 853; and *Cruzan*, 497 U.S. at 288. *See also* Kreimer, *supra* note 8, at 835 (interpreting *Casey's* joint opinion as being broader than Justice O'Connor's *Cruzan* opinion because *Casey* "imports a woman's right to exercise affirmative control over her own body, not merely her right to resist external intrusions").

competent, terminally ill individuals does not leave the state without a role.[231] As in *Casey*, the Court can limit the initial expansive sweep of such a decision by allowing the government to regulate and prohibit assisted suicide when appropriate. The *Casey* Court held that a series of state regulations discouraging abortion did not unduly burden a woman's liberty interest in a pre-viability abortion.[232] The regulation of physician-assisted suicide could parallel the *Casey*-approved abortion regulations. At a minimum, the state could require distribution of state-endorsed literature to those requesting suicide, a reasonable waiting period after the initial request, informed consent, and notice of alternatives to suicide.[233] The state may endorse, prefer, and promote life over choice as long as it does not unduly burden the exercise of the liberty interest.[234]

The state can also protect its compelling interest in preserving life by placing an absolute prohibition on physician assisted suicide by minors and physically-able adults.[235] As in *Roe* and *Casey*, the state can prohibit the exercise of a fundamental liberty interest when the state's interest becomes compelling.[236] A state may prohibit abortion after viability despite a woman's liberty interest in her bodily integrity and autonomy.[237] A woman's liberty interest, while not diminished, is simply outweighed by the growing state interest in the potential life of the fetus.[238]

Likewise, in the assisted suicide context, a state's interest in preserving life should not unduly burden the terminally ill individual's liberty interest during the final six months of life.[239] The life is still valuable, but the state's interest in preserving life is diminished because there is little life to preserve. The state may impose a ban on assisted suicide for non-terminally ill individuals, not because the liberty interest is less, but rather because the state's interest in preserving the individual's life outweighs the liberty interest.[240]

Justice O'Connor's opinions in this area are consistent with allowing a terminally ill individual to exercise decisional privacy in choosing the manner of his or her death.[241] In Justice O'Connor's view, the government is not in the business of making personal, intimate decisions for individuals.[242] Justice O'Connor's

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[231] *See* Compassion in Dying v. Washington, 79 F.3d 790, 832-34 (9th Cir. 1996).

[232] *See Casey*, 505 U.S. at 879.

[233] *See id. See also* Kline, *supra* note 10, at 224-26 (a more detailed discussion of the use of *Casey's* holding that Pennsylvania's statute did not unduly burden a woman's liberty interest in abortion as a model for permitted state regulation of physician-assisted suicide).

[234] *See* Casey, 505 U.S. at 883.

[235] *See Compassion in Dying*, 79 F.3d at 820.

[236] *See Casey* 505 U.S. at 874-79; and Roe v. Wade, 410 U.S. 113, 164-66 (1973).

[237] *See Roe*, 410 U.S. at 163-64.

[238] *See id.*

[239] *See Compassion in Dying*, 79 F.3d at 820.

[240] *See* Kline, *supra* note 10, at 233-35.

[241] *See Casey*, 505 U.S. 851-53; Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 288-89 (1990); and Michael H. v. Gerald D., 491 U.S. 110, 132 (1989).

[242] *See Casey*, 505 U.S. at 851-53; *Cruzan*, 497 U.S. at 288-89.

opinions also indicate an unwillingness to allow the government to intrude on an individual's bodily integrity.[243] The state invades the bodily integrity of a terminally ill individual if it forces the individual to endure final days of suffering and indignity against his or her will. The government may regulate as long as it does not unduly burden the exercise of the liberty interest.

V. CONCLUSION

The Supreme Court should find a constitutionally protected liberty interest in physician assisted suicide. The state should not require individuals faced with terminal illness to serve sentences of prolonged suffering before dying. The state should provide a more humane option to those who choose to end their suffering, while preserving their dignity. The Constitution was created to restrict government power over the individual. Consistent with that approach to the Constitution, decision making in matters of an intimate and personal nature should be left to the individual, not the government. The government may still play a role in regulating and limiting the liberty interest, but it may not prohibit it in all circumstances. To hold otherwise would weigh in on the side of aggrandizing government power at the mentally competent, terminally ill individual's expense.

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[243] *See Cruzan*, 497 U.S. at 287.