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The Constitutionality of Laws Banning Physician Assisted Suicide

*Richard S. Myers**

I. INTRODUCTION¹

The United States Supreme Court seemed to have settled the constitutionality of laws banning physician assisted suicide in its 1997 decisions in *Washington v. Glucksberg*² and *Vacco v. Quill*.³ *Obergefell v. Hodges*,⁴ the Court's same-sex marriage decision, has, however, raised concerns that the Court might be prepared to revisit *Glucksberg* and *Quill*.⁵ *Obergefell* reaffirmed the Court's commitment to an expansive understanding of substantive due process, and suggests that the Court, if given an opportunity, will overrule *Washington v. Glucksberg* and *Vacco v. Quill*, although this is not inevitable.⁶

In considering this issue, though, it is important to revisit decisions from several decades ago when courts allowed patients to withdraw medical treatment, even when the withdrawal was intended to shorten the life of the patient. These cases typically claimed that they were not approving a right to die or a right to assisted suicide. But these decisions rejected the sanctity-of-life ethic that had long been a part of our law and also emphasized the radical autonomy perspective that the Supreme Court has relied upon in substantive due process

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1. This article draws from several previously published articles of mine. See Richard S. Myers, *Obergefell and the Future of Substantive Due Process*, 14 AVE MARIA L. REV. 54 (2016) [hereinafter Myers, *Obergefell*]; Richard S. Myers, *Re-reading Roe v. Wade*, 71 WASH. & LEE L. REV. 1025 (2014) [hereinafter Myers, *Roe*]; Richard S. Myers, *Pope John Paul II, Freedom, and Constitutional Law*, 6 AVE MARIA L. REV. 61 (2007); Richard S. Myers, *The End of Substantive Due Process?*, 45 WASH. & LEE L. REV. 557 (1988) [hereinafter Myers, *Due Process*]. To avoid multiplying footnotes, I will not always indicate when I have drawn from these articles.

2. 521 U.S. 702 (1997).

3. 521 U.S. 793 (1997).

4. 135 S. Ct. 2584 (2015).

5. See Myers, *Obergefell*, *supra* note 1, at 65–70.

6. *Id.*

cases such as *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁷ *Lawrence v. Texas*,⁸ and *Obergefell v. Hodges*.⁹

These withdrawal-of-treatment cases preserved a line between passive and active measures to terminate the life of patients, and so the decisions did not approve physician assisted suicide or euthanasia. But the distinctions the courts drew were more practical than logical. There is a very thin line between many of these withdrawal-of-treatment cases and a right to assisted suicide.

Since 1997, when the Court rejected constitutional challenges to laws banning assisted suicide, there has been a slow but discernible move in favor of assisted suicide. This is certainly true in some foreign countries, such as the Netherlands, Belgium and Canada. This is also true in the United States, where assisted suicide is now legal in several states, including importantly California. Other cultural trends also favor the legalization of assisted suicide. I think the Supreme Court, if given an opportunity, will rely on these developments and *Obergefell's* reaffirmation of the autonomy perspective and strike down state laws banning physician assisted suicide.

This is by no means inevitable. Those who oppose physician assisted suicide still have an opportunity to express their views in the democratic process and to help rebuild cultural support for the sanctity of life perspective.

II. LEGAL BACKGROUND

As noted above, the constitutionality of laws banning physician assisted suicide seems to have been settled by the Court's 1997 decisions in *Washington v. Glucksberg* and *Vacco v. Quill*. In those cases, the Court rejected the idea that there is a fundamental right to assisted suicide.¹⁰ In so doing, the Court refused to rely on the radical

7. 505 U.S. 833, 846–53 (1992). For commentary on *Casey*, see Richard S. Myers, *Reflections on the Twentieth Anniversary of Planned Parenthood v. Casey*, in LIFE AND LEARNING XXII: THE PROCEEDINGS OF THE TWENTY-SECOND UNIVERSITY FACULTY FOR LIFE CONFERENCE (Joseph W. Koterski, ed.) (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2150241. See also Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995 (2003).

8. 539 U.S. 558, 559 (2003).

9. 135 S. Ct. 2584 (2015).

10. *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997). In *Vacco v. Quill*, the Court rejected an equal protection argument. The Court agreed that there is a difference between letting a patient die (by refusing life-saving medical treatment) and killing a patient (by assisting in the patient's suicide). According to the Court, "[l]ogic and contemporary practice support New York's judgment that the two acts are different, and New York may therefore, consistent

autonomy perspective articulated in *Planned Parenthood of South-eastern Pennsylvania v. Casey*,¹¹ and instead inquired whether there was any support for the view that a right to assisted suicide was deeply rooted in our Nation's history and tradition. The Court carefully reviewed the relevant history and stated:

[W]e are confronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults. To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State.¹²

In *Glucksberg*, unlike in *Roe v. Wade*¹³ or in *Obergefell v. Hodges*, the Court was unwilling to take that step.

The *Glucksberg* Court's approach to substantive due process became the governing standard, despite the Court's decision in *Lawrence v. Texas*.¹⁴ The Court's decision in *Obergefell v. Hodges* seems to change this. In supporting same-sex marriage, the *Obergefell* Court principally relied on the doctrine of substantive due process.¹⁵ The Court rejected *Glucksberg's* historical approach to substantive due process and relied rather on its own understanding of the nature of liberty. This understanding emphasizes respect for individual autonomy and self-determination and choice, at least when the conduct

with the Constitution, treat them differently. By permitting everyone to refuse unwanted medical treatment[,] while prohibiting anyone from assisting a suicide, New York law follows a longstanding and rational distinction." 521 U.S. at 808.

11. In *Casey*, the joint opinion stated: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Casey*, 505 U.S. at 851. One commentator fairly stated that the Court had adopted the view that moral relativism was a constitutional command. See Steven Gey, *Is Moral Relativism a Constitutional Command?*, 70 IND. L. J. 331 (1995). Gey stated: "[T]he typical focus on the mechanics of *Casey* and *Roe* has unfortunately overshadowed the fact that a very conservative Supreme Court has strongly reaffirmed the principle that moral autonomy is the philosophical basis for the constitutional privacy right." *Id.* at 363.

12. *Glucksberg*, 521 U.S. at 723.

13. 410 U.S. 113 (1973). For commentary on *Roe*, see Myers, *Roe*, *supra* note 1.

14. 539 U.S. 558 (2003). *Lawrence* seemed to revive the broader, more expansive approach to substantive due process. The Court relied upon the "mystery passage" from *Casey* and extolled the idea of moral autonomy. The *Lawrence* Court did not even cite *Glucksberg*. Yet, despite all of this, *Glucksberg*, with its emphasis on history and tradition, seemed to remain the dominant approach to substantive due process. See Myers, *Obergefell*, *supra* note 1, at 60–61 (discussing this point).

15. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015). The Court did cite both due process and equal protection, yet it seems clear that liberty and autonomy are doing most of the work. See Myers, *Obergefell*, *supra* note 1, at 61 n. 52.

involved, the Court said, “the rights of two consenting adults whose marriage[] would pose no risk of harm to themselves or third parties.”¹⁶ The dissenters complained, with some justification, that the Court had effectively overruled *Glucksberg’s* approach to substantive due process.¹⁷

Obergefell seems to be an effort to cement the Court’s broad approach to substantive due process. The Court’s analysis was unconstrained by history or a careful description of the right or even an assessment of emerging trends. The Court’s focus was more on its own reflections on the nature of liberty and its own discernment of new insights and societal understandings about “what freedom is and must become.”¹⁸ The Court’s understanding is an endorsement of the “autonomy of self” the Court celebrated in *Lawrence*¹⁹ and of the “mystery passage” of *Casey*.²⁰ The Court seems to have concluded that while “[t]he [Fourteenth] Amendment does not enact Mr. Herbert Spencer’s Social Statics[],”²¹ it does enact John Stuart Mill’s *On Liberty*.²²

It is not clear where this will lead. There has been much speculation about *Obergefell’s* potential impact on issues such as polygamy.²³ My focus here is on *Obergefell’s* potential impact on cases challenging state laws banning assisted suicide. Since *Obergefell*, there have been a couple of state court decisions discussing the constitutionality of laws banning assisted suicide. In *Morris v. Brandenburg*,²⁴ the Su-

16. *Obergefell*, 135 S. Ct. at 2607.

17. Chief Justice Roberts stated: “[T]he majority’s position requires it to effectively overrule *Glucksberg*, the leading modern case setting the bounds of substantive due process.” *Id.* at 2621 (Roberts, C.J., dissenting).

18. *Id.* at 2603.

19. *Lawrence*, 539 U.S. at 562.

20. *See supra* note 11.

21. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), *overruled in part by* *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

22. Chief Justice Roberts’s dissent stated “the Fourteenth Amendment does not enact John Stuart Mill’s *On Liberty* any more than it enacts Herbert Spencer’s *Social Statics*.” *Obergefell*, 135 S. Ct. 2622 (Roberts, C.J., dissenting). This comparison is a staple in the literature. *See Myers, Due Process, supra* note 1, at 604, n. 278.

23. *See Myers, Obergefell, supra* note 1, at 55 n. 5, 64–65.

24. *Morris v. Brandenburg*, 376 P.3d 836 (N.M. 2016). In *Morris*, the trial court had legalized assisted suicide in an opinion that rested on the autonomy rationale. The New Mexico Court of Appeals reversed this decision by a 2-1 vote. 356 P.3d 564 (N.M. Ct. App. 2015). The two judges in the majority thought, rather implausibly, that *Obergefell* had endorsed *Glucksberg*. For discussion of this point, *see Myers, Obergefell, supra* note 1, at 67 n. 104. The dissent thought that *Glucksberg* had been effectively overruled. The dissent thought it was most appropriate to adopt “the view of liberty, autonomy, and privacy elucidated in the *Ca-*

preme Court of New Mexico upheld the constitutionality of a law banning assisted suicide. In *Myers v. Scheiderman*,²⁵ an intermediate appellate court in New York did the same thing. Although both decisions were based on state constitutional law, *Glucksberg* had a significant effect on both opinions. The courts seemed influenced by the longstanding and still largely persisting tradition in the law opposing assisted suicide. Both courts emphasized the need for judicial restraint.²⁶

These state court decisions are important but I do not think they tell us much about how the United States Supreme Court will approach the issue if afforded an opportunity. I think we are witnessing the same sort of reaction that we saw in the lower courts after *Casey* and *Lawrence*. After these decisions, lower courts were, for the most part, rather cautious about expanding the scope of substantive due process.²⁷ These courts seemed inclined to let the United States Supreme Court extend the reasoning of those cases into new areas. I think that the Supreme Court will be all too willing to do just that if it is given an opportunity to revisit *Glucksberg*.²⁸

In so doing, I think the Court will emphasize the “autonomy of self” philosophy and conclude that ending one’s own life is the ultimate act of self-determination.²⁹ The Court will also likely reject the state’s interest in preserving life because it will likely conclude that it violates autonomy to second-guess an individual’s own subjective assessment of the value of her life.³⁰

The Court will likely emphasize the slow but discernible trend in favor of assisted suicide.³¹ At the time of *Glucksberg*, physician assist-

sey/Lawrence/Obergefell line of cases” and found that under this approach the New Mexico law was unconstitutional. *Morris*, 356 P.3d at 601 (Vanzi, J., dissenting).

25. *Myers v. Schneiderman*, 31 N.Y.S.3d 45 (N.Y. App. Div. 2016).

26. See *Myers, Obergefell*, *supra* note 1, at 67–68 (discussing these opinions). As I have explored, there are real benefits to courts exercising judicial humility on issues of this complexity and importance. See Richard S. Myers, *The Virtue of Judicial Humility*, 13 AVE MARIA L. REV. 207 (2015) [hereinafter *Myers, Virtue*].

27. See *Myers, Obergefell*, *supra* note 1, at 57–61.

28. See *id.* at 65–70.

29. *Id.* at 68.

30. *Id.*

31. In defining the scope of substantive due process, the Court sometimes relies upon its assessments of social trends. For example, in *Lawrence*, the Court emphasized that its analysis of recent history demonstrated “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.” *Lawrence v. Texas*, 539 U.S. 558, 572 (2003).

ed suicide had not yet been legalized in any state in the country.³² Physician assisted suicide is now legal in Oregon, Washington, Vermont, Montana, California, Colorado, and Washington, D.C..³³ International trends have also moved in favor of assisted suicide. The countries leading the way (the Netherlands, Belgium, and Canada) were the same countries that led the way in legalizing same-sex marriage.³⁴ I should note that these developments in the states and in other countries have not moved in a straight line. Some states have rejected proposals to legalize assisted suicide or have strengthened laws banning assisted suicide.³⁵ And certain countries have rejected efforts to legalize assisted suicide.³⁶ There is, though, a slow trend in favor of legalization. Moreover, public opinion seems to be moving in favor of assisted suicide in the last few years, after a long period of relative stability on the issue.³⁷

III. WITHDRAWAL CASES

If the Court revisits the constitutionality of laws banning assisted suicide, older decisions such as *Bouvia*³⁸ (in California), *Brophy*³⁹ (in

32. Oregon's law did not go into effect until October of 1997, several months after *Glucksberg* was decided.

33. See Myers, *Obergefell*, *supra* note 1, at 66 (noting state developments in Oregon, Washington, Vermont, Montana, and California). Colorado legalized assisted suicide in the November 2016 election. Jennifer Brown, *Colorado Passes Medical Aid in Dying, Joining 5 Other States*, DENV. POST (Nov. 9, 2016, 11:40 AM), <http://www.denverpost.com/2016/11/08/colorado-aid-in-dying-proposition-106-election-results/>. The District of Columbia City Council has also legalized assisted suicide, which is now in effect. Micaiah Bilger, *Washington D.C. Becomes 6th Place in the U.S. to Legalize Assisted Suicide*, LIFE NEWS, (Feb. 20, 2017, 11:05 AM), <http://www.lifenews.com/2017/02/20/washington-d-c-becomes-6th-place-in-the-u-s-to-legalize-assisted-suicide/>.

34. See Myers, *Obergefell*, *supra* note 1, at 65–66.

35. See, e.g., Wesley J. Smith, *Ohio Making Assisted Suicide a Felony*, THE CORNER (Dec. 12, 2016, 9:50 AM), <http://www.nationalreview.com/corner/442967/ohio-making-assisted-suicide-felony> (noting that Ohio made assisted suicide a felony in December 2016).

36. South Australia rejected an effort to legalize assisted suicide in November of 2016, Michael Cook, *Assisted Suicide Narrowly Defeated in South Australia*, NRL NEWS TODAY (Nov. 21, 2016), <http://www.nationalrighttolifenews.org/news/2016/11/assisted-suicide-narrowly-defeated-in-south-australia/#.WFRO8vwizIU>. And, on December 6, 2016, the Supreme Court of Appeals of South Africa rejected a constitutional challenge to the law banning assisted suicide. Richard Myers, *Supreme Court of South Africa Rejects Lower Court Decision Allowing Assisted Suicide/Euthanasia*, UNIV. FACULTY FOR LIFE BLOG (Dec. 12, 2016, 11:52 AM), <http://www.uffl.org/blog/2016/12/12/supreme-court-of-south-africa-rejects-lower-court-decision-allowing-assisted-suicideeuthanasia/>.

37. See Myers, *Obergefell*, *supra* note 1, at 66 (noting polling data).

38. See *Bouvia v. Super. Ct. of Cal.*, 179 Cal. App. 3d 1127 (Cal. Ct. App. 1986). In *Bouvia*, the court permitted Elizabeth Bouvia, a competent, 28 year-old quadriplegic with se-

Massachusetts), *Browning*⁴⁰ (in Florida), and *Bland*⁴¹ (in England), will also likely prove important. The withdrawal of treatment area is complicated and I should hasten to add there are many cases when the withdrawal of treatment is appropriate.⁴² But the cases involving the withdrawal of nutrition and hydration are particularly troublesome, although in certain instances the withdrawal of nutrition and hydration is permissible.⁴³

vere disabilities, to withdraw the food and water that were sustaining her life. The appellate court faulted the lower court for failing to give appropriate weight to the quality of her life. The appellate court endorsed the idea that it had to respect her view that “the quality of her life has been diminished to the point of hopelessness, uselessness, unenjoyability and frustration. She, as the patient, lying helplessly in bed, unable to care for herself, may consider her existence meaningless. She can’t be faulted for so concluding. *Id.* at 1142. The court further noted that it had to respect Bouvia’s choice to consider that her “life has been physically destroyed and its quality, dignity and purpose gone . . .” *Id.* at 1143.

39. See *Brophy v. New England Sinai Hosp., Inc.*, 497 N.E.2d 626 (Mass. 1986). In *Brophy*, the court allowed Paul Brophy’s guardian to permit the withdrawal of artificially administered nutrition and hydration. Brophy had been diagnosed as in a persistent vegetative state and had previously expressed his desire not to be maintained in such a condition. The court emphasized the importance of individual autonomy, even when the individual’s choice would be exercised by another through substituted judgment. The state’s interest in preserving life was not weighty enough to override the choice to continue treatment.

40. See *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990). In *Browning*, the court considered the following question: “Whether the guardian of a patient who is incompetent but not in a permanent vegetative state and who suffers from an incurable but not terminal condition, may exercise the patient’s right of self-determination to forego sustenance provided artificially by a nasogastric tube?” *Id.* at 7–8. The court largely endorsed this view. The court rejected the state interests that were claimed to outweigh the right to forego treatment. The state’s interest in preserving life was insufficient, primarily because Browning’s affliction was not curable and the state’s only interest was in briefly maintaining her life. The state’s interest in preventing suicide was not implicated, the court stated, because “the discontinuation of life support ‘in fact will merely result in [her] death, if at all, from natural causes.’” *Id.* at 14.

41. See *Airedale N.H.S. Trust v. Bland* [1993] AC 789. *Bland* involved a patient who had been diagnosed in a persistent vegetative state. Bland’s family and his attending physicians sought permission to withdraw artificially administered food and water, which was ultimately granted by the House of Lords. For commentary on *Bland*, see J.M. Finnis, *Bland: Crossing the Rubicon?*, 109 *LAW. Q. REV.* 329 (1993); John Keown, *The Legal Revolution: From “Sanctity of Life” to “Quality of Life” and “Autonomy,”* 14 *J. Contemp. Health L. & Pol’y* 253 (1997–1998).

42. For discussion of this issue, see WILLIAM E. MAY, *CATHOLIC BIOETHICS AND THE GIFT OF HUMAN LIFE* 277–85 (2d. ed. 2008) (explaining the distinction between ordinary (proportionate) and extraordinary (disproportionate) treatments). May explains that one “can refuse a treatment . . . without adopting by choice a proposal to kill himself or herself. The treatment refusal is based on the judgment that the treatment itself, or its side effects or deleterious consequences, are so burdensome that undergoing the treatment is not morally obligatory. The treatment in question is truly ‘extraordinary/disproportionate’ since the burdens it imposes far exceeds the benefits likely to result from its use.” *Id.* at 282. In making this judgment, “[o]ne does not judge a life excessively burdensome; one judges a treatment excessively burdensome.” *Id.* at 283; see also Keown, *Legal Revolution*, *supra* note 41, at 238–39.

43. MAY, *CATHOLIC BIOETHICS*, *supra* note 41, at 285–302. See John S. Howland & Peter J. Gummere, *Challenging Common Practice in Advanced Dementia Care: A Fresh Look*

In these cases, the courts often adopted the autonomy perspective that later surfaced in *Casey* and *Obergefell*. In *Brophy*, which involved the withdrawal of food and water from a patient in a persistent vegetative state, the Supreme Judicial Court of Massachusetts relied on “the right of self-determination and individual autonomy”⁴⁴ and in so doing specifically relied upon John Stuart Mill’s *On Liberty*.⁴⁵ In *Browning*, which involved the withdrawal of food and water from a severely disabled patient, the Florida Supreme Court found that the “fundamental right of self-determination, commonly expressed as the right of privacy, controls this case.”⁴⁶ In *Bouvia*, the concurring opinion thought the withdrawal of nutrition and hydration was permissible even if understood as a suicide, which the concurrence thought was in fact at stake.⁴⁷ The concurrence echoed the majority’s view that “a desire to terminate one’s life is probably the ultimate exercise of one’s right to privacy”⁴⁸ and stated that

The right to die is an integral part of our right to control our own destinies so long as the rights of others are not affected. That right should, in my opinion, include the ability to enlist the assistance of others, including the medical profession, in making death as painless and quick as possible.⁴⁹

This celebration of autonomy, even the autonomy to make lethal choices, is (as this concurrence makes clear) paving the way to the acceptance of more active steps to terminate life. Embedding the autonomy rationale in the law is dangerous, as cases from two decades ago make clear. Prior to *Glucksberg*, several courts relied on the extreme autonomy rationale in *Casey* to support the view that there ex-

at Assisted Nutrition and Hydration, 14 NAT’L CATH. BIOETHICS Q. 53 (2014) (discussing the moral issues relating to assisted nutrition and hydration with a particular focus on patients with dementia).

44. *Brophy*, 497 N.E.2d at 633.

45. *Id.* The court stated: “The right of self-determination and individual autonomy has its roots deep in our history. John Stuart Mill stated the concept succinctly: “[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right.” (quoting John Stuart Mill, *On Liberty*, in 43 GREAT BOOKS OF THE WESTERN WORLD 271 (R. Hutchins ed. 1952)).

46. *In re Guardianship of Browning*, 568 So. 2d 4, 9 (Fla. 1990).

47. *Bouvia v. Superior Ct. of Cal.*, 179 Cal. App. 3d 1127, 1146–47 (Cal. Ct. App. 1986) (Compton, J., concurring).

48. *Id.* at 1144.

49. *Id.* at 1147 (Compton, J., concurring).

isted a fundamental right to die.⁵⁰ The most prominent example was the Ninth Circuit's en banc opinion in *Glucksberg*,⁵¹ which was written by Judge Reinhardt, who is often a cultural bellwether on social issues.⁵² Now with *Obergefell*,⁵³ it seems likely that the Court will push the autonomy logic of the withdrawal cases to permit physician assisted suicide.

These cases also reject the idea that the state's interest in preserving life can override the patient's autonomy. In fact, autonomy does double duty here. In evaluating the state's interest in life, the courts emphasize that they must defer to the patient's subjective assessment of the value of her life.⁵⁴ The courts claim that they are not adopting a quality of life approach,⁵⁵ but I don't think there is any other way to read the opinions. In commenting on the *Bland* case, Peter Singer stated that the case marked the collapse of the traditional, sanctity-of-

50. See Richard S. Myers, *An Analysis of the Constitutionality of Laws Banning Assisted Suicide from the Perspective of Catholic Moral Teaching*, 72 U. DET. MERCY L. REV. 771, 778–79 (1995) (discussing these cases).

51. *Compassion in Dying v. Washington*, 79 F. 3d 790, 793 (9th Cir. 1996) (en banc). After quoting the mystery passage from *Casey*, Judge Reinhardt stated: "The district judge in this case found the Court's reasoning in *Casey* 'highly instructive' and 'almost prescriptive' for determining 'what liberty interest may inhere in a terminally ill person's choice to commit suicide.'" *Compassion in Dying*, 850 F. Supp. at 1459. We agree." *Id.* at 813.

52. See Myers, *Virtue*, *supra* note 26, at 208–09 (making this point about Judge Reinhardt).

53. These withdrawal of treatment decisions were decided before *Glucksberg* and the Court in *Glucksberg* and *Quill* rejected the idea that these decisions could be extended to support a right to assisted suicide. The Court in 1997 though seemed keen to issue a restrained ruling, perhaps in the wake of *Casey* and the Court's abortion decisions. Myers, *Roe*, *supra* note 1, at 1043. *Obergefell* seems to indicate an increased willingness on the part of the Court to venture into new territories (i.e., to find new constitutional rights). This new willingness creates the risk that the Court will seize on the principle of autonomy embedded on the law since at least the 1980s.

54. See *Bouvia*, 179 Cal. App. 3d at 1142–43.

55. In *Brophy*, the court stated: "[W]e make no judgment based on our own view of the value of Brophy's life, since we do not approve of an analysis of State interests which focuses on Brophy's quality of life. The judge correctly disavowed pronouncing judgment that Brophy's life is not worth preserving." *Brophy v. New England Siani Hosp. In.*, 497 N.E.2d 626, 635 (Mass. 1986) (citations omitted). Justice O'Connor's dissent thought that the majority had indeed relied on quality of life concerns. Justice O'Connor stated: "Even in cases involving severe and enduring illness, disability and 'helplessness,' society's focus must be on life, not death, with dignity. By its very nature, every human life, without reference to its condition, has a value that no one rightfully can deny or measure. Recognition of that truth is the cornerstone on which American law is built. Society's acceptance of that fundamental principle explains why, from time immemorial, society through law has extended its protection to all, including, especially, its weakest and most vulnerable members. The court's implicit, if not explicit, declaration that not every human life has sufficient value to be worthy of the State's protection denies the dignity of all human life, and undermines the very principle on which American law is constructed." 497 N.E.2d at 646 (O'Connor, J., concurring in part and dissenting in part).

life ethic.⁵⁶ John Keown has noted that although Singer's comment may be overstated, the *Bland* court did deal a blow to the sanctity-of-life principle that might prove fatal.⁵⁷

The courts refer to severely disabled patients as having "bare existence"⁵⁸ or "mere corporeal existence."⁵⁹ In fact, in *Brophy*, the court said the "burden of maintaining the corporeal existence degrades the very humanity it was meant to serve."⁶⁰ It is necessary, the courts say, to defer to the patient's judgment that his life is "degrading and without human dignity"⁶¹ or "meaningless."⁶² In *Bland*, the judges stated that there was no benefit to keeping Tony Bland alive.⁶³ They treated him as already dead.⁶⁴ Because he lacked certain cognitive abilities, he was effectively a non-person. One of the judges described Bland's condition in this way: "his body is alive, but he has no life in the sense that even the most pitifully handicapped but con-

56. PETER SINGER, RETHINKING LIFE AND DEATH: THE COLLAPSE OF OUR TRADITIONAL ETHICS 73 (1994).

57. Keown, *Legal Revolution*, *supra* note 41, at 255. Keown's paper contains a good account of the sanctity of life principle and of the reasons for the prohibition of intentional killing an innocent human being. *Id.* at 256–61.

58. *In re Guardianship of Browning*, 568 So. 2d 4, 15 (Fla. 1990).

59. *Brophy*, 497 N.E.2d at 635.

60. *Id.*

61. *Id.* at 636.

62. *Bouvia v. Super. Ct. of Cal.*, 179 Cal. App. 3d 1127, 1143 (Cal. Ct. App. 1986).

63. See Finnis, *supra* note 41, at 333 ("The judges in *Bland* proceed, of course, on the basis that the responsible physician no longer had any duty to prevent Bland's death. His death would be for him no harm or loss. Or as they put it, neither continued life nor the measures necessary to keep him alive were of any benefit to him, or in his best interests."). Another way to express this is to say that these patients would be better off dead. One leading academic proponent of physician assisted suicide states that "many treatment withdrawals reflect an intent to die. Patients often refuse life-sustaining treatment because they perceive their life as burdensome and therefore want to die." David Orentlicher, *The Alleged Distinction Between Euthanasia and the Withdrawal of Life-Sustaining Treatment: Conceptually Incoherent and Impossible to Maintain*, 1998 U. ILL. L. REV. 837, at 846. According to this scholar, these choices are morally justified because "when life becomes sufficiently miserable, a person can reasonably believe that continued life is worse than death." *Id.* at 851–52. This is, as this scholar quite candidly notes, an acceptance of the view that the lives of such patients are "no longer worth living," David Orentlicher, *The Legalization of Physician Assisted Suicide: A Very Modest Revolution*, 38 B. C. L. REV. 443, 465 (1997), and that they "would be better off dead" Orentlicher, 1998 U. ILL. L. REV. at 852.

64. In *Brophy*, Paul Brophy's wife had decided that "her husband's 'life is over[.]'" 497 N.E.2d at 632. One commentator noted: "But there can be no valid interest in preserving life when there is no life left to preserve. A ban on the use of physician-prescribed medications by a terminally ill person to hasten that person's inevitable death does not advance any conceivable interest in preserving life." Robert A. Sedler, *Constitutional Challenges to Bans on "Assisted Suicide": The View from Without and Within*, 21 HASTINGS CONST. L. Q. 777, 790 (1994).

scious human being has a life”;⁶⁵ Bland’s existence was a “humiliation.”⁶⁶ Justice Stevens said basically the same thing in his *Cruzan* dissent when he noted that

Nancy Cruzan is obviously ‘alive’ in a physiological sense. But for patients like Nancy Cruzan, who have no consciousness and no chance of recovery, there is a serious question as to whether the mere persistence of their bodies is “life” as that word is commonly used in both the Constitution and the Declaration of Independence.⁶⁷

The key though in most of these opinions is that the courts contend that they must respect the patient’s subjective choice to consider, as the *Bouvia* court stated, that her “life has been physically destroyed and its quality, dignity and purpose gone[.]”⁶⁸ It seems, too, that the courts often endorse the quality of life philosophy reflected, although the opinions typically, in the end, defer to the subjective wishes of the patient. As one of the *Brophy* dissents commented, under this reasoning, “it necessarily follows that the young as well as the old, the healthy as well as the sick, and the firm as well as the infirm, without exception, have the right to commit suicide, and that others have the right to participate in that act.”⁶⁹

These older withdrawal of treatment cases do, typically, say that they are not approving a right to die or a right to suicide.⁷⁰ The cases

65. *Bland*, *supra* note 41, at 850; Keown, *Legal Revolution*, *supra* note 41, at 271 (quoting this and similar descriptions).

66. Finnis, *supra* note 41, at 336 (the judges accept the view that “Bland’s continued existence was not merely no benefit but actually a harm to him, a source of indignity, violation of his wish to be remembered well, humiliation). Anthony Fisher aptly commented that “[i]n Bland’s case . . . the judges have made a radical departure from this traditional ethic and law, allowing that tube-feeding be withdrawn not because of the futility or burdensome of the so-called treatment, but because Tony Bland’s continued life was a source of indignity and humiliation to him, a violation of how he would want to be remembered, and an ordeal for others.”; see Anthony Fisher, *Ordinis Praedicatorum, Moral and Philosophical Dilemmas in Death and Dying*, Address at the Symposium on Death and Dying (Oct. 15, 1994), <https://www.ewtn.com/library/PROLIFE/KILLET.TXT>.

67. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 345 (1990) (Stevens, J., dissenting).

68. *Bouvia v. Super. Ct. of Cal.*, 179 Cal. App. 3d 1127, 1143 (Cal. Ct. App. 1986).

69. *Brophy*, 497 N. E. 2d at 645 (O’Connor, J., concurring in part and dissenting in part).

70. In *Bouvia*, for example, the court stated that Elizabeth’s “decision to allow nature to take its course is not equivalent to an election to commit suicide . . .” *Bouvia*, 179 Cal. App. 3d at 1144. The concurring judge thought that it was clear that Elizabeth Bouvia’s death would be a suicide, which the judge thought should be allowed. The judge stated: “I have no doubt that Elizabeth Bouvia wants to die, and if she had the full use of even one hand, could probably find a way to end her life—in a word—commit suicide. In order to seek the assistance which she

say they are not permitting active steps to terminate lives but are only allowing passive steps (omissions) that allow nature to take its course.⁷¹ But in cases such as *Brophy* and *Bland*, this doesn't seem accurate. The withdrawal of food and water (although passive, an omission) is done with the intent to end the life of the patient. A majority of the judges in *Bland* explicitly stated that the withdrawal of food and water was done with the intent to terminate Tony Bland's life.⁷² As one of the *Brophy* dissents stated,

Paul Brophy will die as a direct result of the cessation of feeding. The ethical principle of double effect is totally inapplicable here. This death by dehydration and starvation has been approved by the court. He will not die from the aneurysm which precipitated his loss of consciousness, the surgery which was performed, the brain damage that followed or the insertion of the G-tube. He will die as a direct result of the refusal to feed him. He will starve to death, and the court approves his death.⁷³

There is a practical line here, between active and passive steps, between acts and omissions. But this has never been regarded as dispositive by the law.⁷⁴ As Justice Scalia noted in his *Cruzan* concurrence, "in the prosecution of a parent for the starvation death of her infant, it was no defense that the infant's death was 'caused' by not action of the parent but by the natural process of starvation, or by the infant's natural inability to provide for itself."⁷⁵ As St. Pope John Paul II commented, "death by starvation or dehydration is, in fact, the only possible outcome as a result of the withdrawal [of food and water]. In

needs in ending her life by the only means she sees available—starvation—she has had to stultify her position before this court by disavowing her desire to end her life in such a fashion and proclaiming that she will eat all that she can physically tolerate. Even the majority opinion here must necessarily 'dance' around the issue. Elizabeth apparently has made a conscious and informed choice that she prefers death to continued existence in her helpless and, to her, intolerable condition. I believe she has an absolute right to effectuate that decision. This state and the medical profession, instead of frustrating her desire, should be attempting to relieve her suffering by permitting and in fact assisting her to die with ease and dignity. The fact that she is forced to suffer the ordeal of self-starvation to achieve her objective is in itself inhumane." 179 Cal. App. 3d at 1146–47 (Compton, J., concurring).

71. See *Brophy*, 497 N. E. 2d at 439; In re Guardianship of Browning, 568 So. 2d 4, 14 (Fla. 1990).

72. Keown, *Legal Revolution*, *supra* note 41, at 254 ("in the express opinion of a majority of their Lordships, the doctor's intent was to kill.").

73. *Brophy*, 497 N.E.2d at 442 (Nolan, J., dissenting).

74. See Keown, *Legal Revolution*, *supra* note 41, at 258.

75. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 297 (1990) (Scalia, J., concurring).

this sense it ends up becoming, if done knowingly and willingly, true and proper euthanasia by omission.”⁷⁶

The troubling aspect of these cases is that they accept withdrawal even if done with the express intent to terminate a life. In cases such as *Bland* and *Brophy*, the withdrawals are not justified because the treatment is burdensome but because the patient’s life is a burden or is thought to be worthless.⁷⁷

The withdrawal cases show that extreme autonomy and the quality of life ethic have been embedded in the law for some time now. The decline of the sanctity of life ethic can be seen in other contexts as well. The current move to increase prenatal screening for Down Syndrome is just one example.⁷⁸ I think this decline can also be seen in the recent New Mexico litigation involving that state’s ban on assisted suicide. In that case, the state did not defend the law by asserting an interest in life.⁷⁹

IV. CONCLUSION

Now, with *Obergefell* (reaffirming the autonomy rationale), and with other cultural trends, it seems increasingly likely that the Court

76. See Richard S. Myers, *Reflections on the Terri Schindler-Schiavo Controversy*, XIV LIFE & LEARNING 39, n.99 (quoting Pope John Paul II, “Address to the Participants in the International Congress on Life-Sustaining Treatments and the Vegetative State: Scientific Advances and Ethical Dilemmas” (Mar. 20, 2004)), <http://www.uffl.org/Vol14/myers-04.pdf>.

77. The dissents in *Brophy* discussed this point at some length. See *Brophy*, 497 N. E. 2d at 642–43 (Lynch, J., dissenting in part); *Id.* at 643–46 (O’Connor, J., concurring in part and dissenting in part). Justice O’Connor, for example, emphasized that the lower court explicitly found that the decision to withdraw food and water was not due to the burdensome of the treatment but was rather based on the view, as Justice O’Connor put it, that “life in any event is not worth living and its continuation is intolerable.” *Id.* at 644 (O’Connor, J., concurring in part and dissenting in part). In commenting on the *Bland* case, John Keown noted that “it was *Bland*’s life, and not his tube-feeding, that was adjudged worthless” Keown, *Legal Revolution*, *supra* note 41, at 272.

78. See Robert McFarland, *Life Worthy of Life: Down Syndrome, Equality, and My Son Silas*, THE WITHERSPOON INSTITUTE (Oct. 26, 2016), <http://www.thepublicdiscourse.com/2016/10/18123/> for a forceful reflection on these issues.

79. The New Mexico Supreme Court emphasized three state interests in support of its law banning assisted suicide— (1) an interest in protecting the integrity of the medical profession; (2) an interest in protecting vulnerable groups from abuse, neglect and mistakes; and (3) an interest in avoiding a progression to voluntary or involuntary euthanasia. The Court didn’t rely on the state’s interest in protecting the life of the person who wanted to commit suicide, even though that interest had been important in *Washington v. Glucksberg*, 521 U. S. at 728–30 (discussing the state’s interest in the preservation of life). Perhaps tellingly, the New Mexico court described this interest in this way—“The State concedes that it does not have an interest in preserving a painful and debilitating life that will end imminently.” *Morris v. Brandenburg*, 376 P.3d at 855.

will overrule *Glucksberg*. In 1997, state laws and the views of establishment organizations (e.g., American Medical Association) were largely arrayed against recognition of a right to physician assisted suicide.⁸⁰ Now, the trends seem to be moving slowly in favor of allowing assisted suicide. Some medical associations have dropped their opposition to physician assisted suicide.⁸¹ Even the AMA is considering whether to take a neutral position on this issue.⁸² In his dissent in *Obergefell*, Justice Alito commented that the only real constraint on the Court's power is a majority of the Court's "own sense of what those with political power and cultural influence are willing to tolerate."⁸³ In 1997, the Court was unwilling to extend substantive due process to protect the right to die. But the legal and cultural situation has changed sufficiently so that it seems likely that a majority of the Court will be willing to extend the autonomy rationale it relied upon in *Obergefell* to protect physician assisted suicide.

This is by no means inevitable.⁸⁴ Because the Court has not yet intervened to "resolve" this controversy,⁸⁵ opponents of assisted suicide still have the opportunity to advance their views and to rebuild the sanctity of life norm.

80. In *Glucksberg*, the Court noted that "the American Medical Association, like many other medical and physicians' groups, has concluded that '[p]hysician-assisted suicide is fundamentally incompatible with the physician's role as healer.'" *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997) (quoting American Medical Association, Code of Ethics section 2.211 (1994)).

81. A handbook prepared by a leading right to die group notes the importance of the views of medical associations in influencing the debate on this issue. *Medical Aid in Dying: A Handbook for Engaging State Medical Associations*, COMPASSION & CHOICES, <https://www.compassionandchoices.org/wp-content/uploads/2016/09/C-C-State-Medical-Association-Handbook-FINAL-8.26.16-Approved-for-Public-Distribution.pdf> (last visited 2/1/17).

82. Fr. Mark Hodges, *American Medical Association Approves Resolution to 'Study' Assisted Suicide*, LIFE SITE (June 21, 2016, 9:30 PM), <https://www.lifesitenews.com/news/american-medical-association-approves-resolution-to-study-assisted-suicide>.

83. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2643 (2015) (Alito, J., dissenting).

84. Much depends on the Court's personnel at the time the issue is considered.

85. The Court sometimes claims that its decisions "resolve" social controversies. But, as the continuing resistance to the Court's decisions in *Roe v. Wade* and *Casey* indicate, this is not an accurate account of the impact of the Court's rulings. See Myers, *Virtue*, *supra* note 26, at 211 (discussing this in the context of abortion).