"I DON'T WANT TO DIE, BUT I AM DYING": REEXAMINING PHYSICIAN-ASSISTED SUICIDE IN A NEW AGE OF SUBSTANTIVE DUE PROCESS

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Whether a person has the right to physician-assisted suicide ("PAS") has been a contentious topic throughout history. The U.S. Supreme Court, in its 1997 decision Washington v. Glucksberg, *delivered a plurality opinion determining that there is no constitutionally protected right to PAS. The Court reasoned that PAS is not deeply rooted in the country's history or tradition and that it is not implicit in the concept of ordered liberty.*

The landscape of substantive due process has changed dramatically since Glucksberg *was decided. New fundamental rights have been recognized using both reasoning from older case law and a renewed focus on the values of dignity and autonomy that the Court declined to consider in* Glucksberg. *There are many similarities between PAS and the already-established fundamental rights of abortion, refusal of treatment, same-sex sexual intercourse, and same-sex marriage. It is time for PAS to be recognized alongside these as a fundamental right. As more cases considering fundamental rights are decided,* Glucksberg *no longer represents the standard for substantive-due-process analysis but rather is an anomaly that interrupts an otherwise consistent line of reasoning and analysis employed by courts in substantive-due-process cases.*

Although the full impact of Lawrence v. Texas *and* Obergefell v. Hodges *still lies ahead, three guiding principles from these cases can be extrapolated and applied to PAS. First, while history and tradition, which were emphasized by the Supreme Court in* Glucksberg, *remain important factors to consider, they are only the beginning of the fundamental-right analysis. Second, courts are now able to apply*

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a broader definition of the right to be recognized instead of being confined to the careful description requirement of Glucksberg. *Lastly, there is a deep, growing concern for protecting the dignity, personal autonomy, and privacy of individuals. These principles apply both directly and indirectly to PAS and support the recognition of PAS as a fundamental right. Further, the undue-burden test from the abortion cases, such as* Planned Parenthood of Southeastern Pennsylvania v. Casey, *can serve as guidance to predict the limitations that could be placed on PAS after it is recognized as a fundamental right.*

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INTRODUCTION

In 2014, a terminally ill woman named Brittany Maynard captured the nation's attention when she released a video explaining her decision to end her own life.[1] Brittany, a vibrant 29-year-old California native, was diagnosed with the most

1. *About Brittany Maynard*, BRITTANY MAYNARD FUND, http://thebrittanyfund.org/about/ (last visited Oct. 1, 2016). Brittany's story went viral and a video of her discussing her decision received over 9 million views in its first month. *Id.*

aggressive and deadly form of brain cancer[2] in early 2014.[3] The disease's treatment options—surgery, chemotherapy, and radiation—are unlikely to result in successful remission, and the most effective therapies prolong a patient's life by a mere three months.[4]

After an unsuccessful surgery, an increase in her debilitating symptoms, and no hope for a cure, Brittany began searching for a way to end her suffering.[5] At the time, California did not offer PAS, so she moved to Oregon with her family to take advantage of that state's death-with-dignity laws.[6] Oregon law permitted a doctor to prescribe medication that would painlessly and peacefully end her life when and if she chose to ingest it.[7] Brittany explained her situation by simply and eloquently stating, "I don't want to die, but I am dying."[8] She added:

> My [cancer] is going to kill me, and it's a terrible, terrible way to die, so to be able to die with my family with me, to have control of my own mind . . . to go with dignity is less terrifying. When I look into both options I have to die, I feel this is far more humane.[9]

Using legally obtained medication, Brittany ended her life.[10] She could avoid the slow, painful death from cancer that would have robbed her of her dignity and humanity.[11]

By contrast, Bette-Ann Rossi,[12] a 56-year-old Rhode Island native, was unable to make a similar choice when she was diagnosed with stage-four, terminal lung cancer in December 2012. By May 2013, after multiple rounds of chemotherapy and radiation, two surgeries, one blood clot, and a lot of praying, the cancer spread to her liver, brain, and bones, leaving the once vivacious dance teacher unable to walk. For four long months until she finally died, Bette-Ann needed two nurses to help her use the bathroom. She could not remember her daughter's name.

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2. Glioblastoma Multiforme is a fast-growing type of brain cancer that typically results in death of the patient within 15 months after diagnosis. *Glioblastoma Multiforme*, AM. ASS'N OF NEUROLOGICAL SURGEONS, http://www.aans.org/en/Patients/Neurosurgical-Conditions-and-Treatments/Glioblastoma-Multiforme (last visited Mar. 2, 2018).

3. *Brittany's First Video*, BRITTANY MAYNARD FUND, http://thebrittanyfund.org/brittanys-first-video-2/ (last visited Mar. 2, 2018).

4. *Glioblastoma Multiforme*, *supra* note 2.

5. *Brittany's First Video*, *supra* note 3.

6. *Id.*; *see infra* Section I.C for a discussion of Oregon's law. At the time, PAS was not legal in her home state of California.

7. *Brittany's First Video*, *supra* note 3.

8. Nicole Weisensee Egan, *Cancer Patient Brittany Maynard: Ending My Life My Way*, PEOPLE, Oct. 27, 2014, at 64, 66.

9. *Id.* at 66–67.

10. *New Video Shows Impact of Brittany Maynard's Message*, BRITTANY MAYNARD FUND, http://thebrittanyfund.org/brittany-maynards-legacy-one-year-later/ (last visited Mar. 2, 2018).

11. *Id.*

12. *Bette-Ann Rossi Obituary*, WOODLAWN FUNERAL HOME, http://www.woodlawnri.com/obituary/Bette-Ann-Rossi/Johnston-RI/1233535 (last visited Mar. 2, 2018).

She experienced terrifying hallucinations and often screamed in pain from the cancer that had contaminated her bones. She did not want to die, but she was dying.

Because Bette-Ann did not have the opportunity to move to a state where PAS was legal, she was effectively denied the option of humane death and was instead forced to suffer a slow, agonizing one. Brittany Maynard and Bette-Ann Rossi were both faced with the reality that they were going to die from cancer, but only one woman had the chance to choose dignity in death. Now the time has come to recognize the autonomy of all Americans during one of the most intimate times in their lives: their deaths.

PAS has been a hotly debated topic for over a century.[13] In 1997, the issue finally came before the U.S. Supreme Court in *Washington v. Glucksberg*.[14] The Court in *Glucksberg* found that "the Due Process Clause specially protects those fundamental rights and liberties which are objectively 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty.'"[15] The Court was not prepared to recognize PAS as deeply rooted within our tradition and held that PAS was not a constitutionally protected right.[16]

Prior to *Glucksberg*, in cases such as *Cruzan ex rel. Cruzan v. Director, Missouri Department of Health* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court regarded dignity, autonomy, and the intimateness of the decision as important factors to consider when determining whether a right is fundamental. In the years since *Glucksberg*, many substantive-due-process cases have been adjudicated and new fundamental rights have been recognized.[17] Disregarding *Glucksberg*, the doctrine of substantive due process has continued to evolve consistently.[18] By rejecting the lower courts' reasoning, which was in line with that of the preceding substantive-due-process cases, *Glucksberg* interrupted the trajectory and is seemingly inconsistent with both past and present substantive-due-process law.[19] This Note explores the already-established fundamental rights of abortion, refusal of treatment, same-sex sexual intercourse, and same-sex marriage, and applies the same reasoning utilized in those areas to PAS.

Part I outlines the important legal history of PAS, delving into the Court's reasoning in *Glucksberg* for deciding that PAS is not a fundamental right.[20] Part I also explains where public opinion and individual states currently stand on PAS.[21] Part II explains the new developments in substantive due process since *Glucksberg*.

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13. *See Chronology of Assisted Suicide*, DEATH WITH DIGNITY, https://www.deathwithdignity.org/assisted-dying-chronology/ (last visited Mar. 2, 2018).

14. Washington v. Glucksberg, 521 U.S. 702 (1997).

15. *Id.* at 720–21.

16. *Id.*

17. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003); Obergefell v. Hodges, 135 S. Ct. 2584 (2015); *see also* Brian Hawkins, Note, *The* Glucksberg *Renaissance: Substantive Due Process Since* Lawrence v. Texas, 105 MICH. L. REV. 409, 432 (2006).

18. Hawkins, *supra* note 17, at 443.

19. *See infra* Section I.B.

20. *See infra* Part I.

21. *See infra* Part I.

This Part illustrates not only how the new line of judicial reasoning contradicts determinative aspects of the *Glucksberg* decision, but also how it is more consistent with the substantive-due-process cases decided prior to *Glucksberg*.[22] Specifically, Part II examines both the impact of *Lawrence v. Texas*[23] and *Obergefell v. Hodges*[24] on the PAS analysis and the focus of both cases on preserving personal autonomy, protecting intimate decisions, and maintaining dignity.[25] Part II also identifies and defines the three guiding principles of substantive due process that animate *Lawrence* and *Obergefell*.[26]

Applying those principles to PAS, Part III argues that the reasoning in the new substantive-due-process cases, coupled with the reasoning in *Cruzan ex rel. Cruzan v. Director, Missouri Department of Health*[27] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[28] suggests that a competent, terminally ill person's intimate and dignity-oriented decision to die with physician assistance should be recognized as a constitutionally protected fundamental right.[29] Lastly, Part III suggests a plan for evaluating laws restricting access to PAS based primarily on the undue-burden test for abortion outlined in *Casey*.[30]

I. EXPLORING THE HISTORY OF AMERICAN PHYSICIAN-ASSISTED-SUICIDE LAWS

The reasoning employed by courts in the substantive-due-process case law leading up to *Glucksberg* mirrors many of the principles shaping current substantive-due-process jurisprudence.[31] In particular, these cases used history and tradition as guideposts but not as absolute authority when recognizing new fundamental rights that protect personal dignity and autonomy.[32] For example, the Supreme Court in *Casey* and *Cruzan*, and the Ninth Circuit in *Compassion in Dying v. Washington*[33] employed reasoning consistent with principles articulated in later substantive-due-process cases such as *Lawrence* and *Obergefell*.[34]

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22. *See infra* Part II.

23. Lawrence v. Texas, 539 U.S. 558 (2003) (holding that there is a constitutionally protected, fundamental right to consensual sexual activity in the privacy of an individual's home).

24. Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (holding that there is a constitutionally protected, fundamental right to same-sex marriage).

25. *See infra* Part II.

26. *See infra* Part II.

27. Cruzan *ex rel.* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 269 (1990).

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

29. *See infra* Part III.

30. *See infra* Part III.

31. *See infra* Sections II.C, III.A.

32. *See infra* Section I.A.

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

34. *See infra* Part II, Section I.A.

A. Cases Leading Up to Glucksberg

In 1990, the U.S. Supreme Court held that competent individuals have a constitutionally protected right to refuse life-preserving medical treatment.[35] Because of a car accident, Nancy Cruzan was in a persistent vegetative state, and there was no sign that she would regain brain function.[36] Her parents requested that the doctors remove her life-sustaining feeding and hydration tube, which would result in her death.[37]

The Supreme Court concluded that, based on the longstanding doctrine of informed consent,[38] competent patients have a fundamental right to refuse treatment.[39] In addition, guardians of an incompetent patient can prove by clear-and-convincing evidence that the incompetent patient wishes to assert that right.[40] The Court attempted to strike a balance between the right of individuals to refuse treatment and the compelling state interest in ensuring that incompetent patients' life-or-death wishes are followed.[41]

In deciding that PAS is not a fundamental right, the *Glucksberg* Court rejected the reasoning of both the District Court and the Court of Appeals, both of which decided the case under a different name: *Compassion in Dying v. State of Washington*.[42] The lower courts, relying heavily on *Casey*,[43] determined that the way a person dies is so intimate that terminally ill, competent people have a constitutionally protected right to choose how they die.[44] Facing a similarly intimate

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35. Cruzan *ex rel.* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278, 281 (1990).

36. *Id.* at 266–67.

37. *Id.* at 267.

38. Regarding informed consent, the Court explained that

> [a]t common law, even the touching of one person by another without consent and without legal justification was a battery. . . . No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. . . . Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages. The informed consent doctrine has become firmly entrenched in American tort law.

Id.

39. *Id.* at 286–87.

40. *Id.*

41. *See id.* at 280–81.

42. *See* Compassion in Dying v. Washington, 850 F. Supp. 1454 (W.D. Wash. 1994); Compassion in Dying v. Washington, 79 F.3d 790 (9th Cir. 1996); *see also* Washington v. Glucksberg, 521 U.S. 702 (1997).

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

44. *Compassion in Dying*, 79 F.3d at 793.

choice, the Court in *Casey* created a new test[45] for dealing with abortion regulations.[46] Under this new test, "[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability."[47] The Court reasoned that the Constitution provides protection for personal and intimate decisions such as marriage, procreation, contraception, family relationships, child-rearing, and education and stated:

> [t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, 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.[48]

In *Casey*, the Court was concerned with balancing the importance of bodily integrity and personal autonomy with state interests in regulating abortions and protecting the rights of fetuses.[49]

In *Compassion in Dying v. Washington*, the en banc Court of Appeals found *Casey* highly instructive and held that, "[l]ike the decision of whether or not to have an abortion, the decision of how and when to die is one of the 'most intimate and personal choices a person may make in a life-time,' a choice 'central to personal dignity and autonomy.'"[50] The Ninth Circuit also drew from the reasoning in *Cruzan* and concluded that "by recognizing a liberty interest that includes the refusal of artificial provision of life-sustaining food and water, [the *Cruzan* Court] necessarily recognizes a liberty interest in hastening one's own death."[51]

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45. The old test was from *Roe v. Wade*, 410 U.S. 113 (1973). In *Roe*, the Court adopted a trimester system for determining the amount of interference the state could impose on the woman's right to an abortion. In the first trimester, no restrictions could be placed on the woman. In the second trimester, the State could regulate abortions to ensure safety. Lastly, in the third trimester, the state could restrict access to abortions whenever it wanted except for when the abortion was necessary to protect the life of the mother. *Id.* at 164; *see also* Carrie H. Pailet, *Abortion and Physician-Assisted Suicide: Is There a Constitutional Right to Both?*, 8 LOY. J. PUB. INT. L. 45, 50 (2006).

46. *Casey*, 505 U.S. at 878–79.

47. *Id.* at 878.

48. *Id.* at 851.

49. *Id.* at 878–79.

50. Compassion in Dying v. Washington, 79 F.3d 790, 813–14 (9th Cir. 1996) (en banc). In addition, the Supreme Court in *Glucksberg* acknowledged but quickly dismissed the respondents' emphasis on the statement from *Casey* that reads: "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." Washington v. Glucksberg, 521 U.S. 702, 726–28 (1997).

51. *Compassion in Dying*, 79 F.3d at 816.

The Ninth Circuit concluded that the decision to participate in PAS should be made by the individual, stating:

> In this case, by permitting the *individual* to exercise the right to *choose* we are following the constitutional mandate to take such decisions out of the hands of the government, both state and federal, and to put them where they rightly belong, in the hands of the people. We are allowing individuals to make the decisions that so profoundly affect their very existence—and precluding the state from intruding excessively into that critical realm.[52]

The court also stated that under the Constitution, no entity can impose its will upon people in matters that, like one's own death, are "so highly central to personal dignity and autonomy."[53]

B. The Glucksberg *Plurality Opinion*

When *Compassion in Dying* was appealed to the Supreme Court, its name changed to *Glucksberg v. Washington*.[54] In *Glucksberg*, three terminally ill people, four physicians, and a nonprofit organization sued the state of Washington claiming that its statutory ban of assisted suicide violated due process.[55] The plaintiffs argued, and the lower courts agreed, that terminally ill competent people have a fundamental right to PAS.[56] In an opinion seemingly inconsistent with the substantive due process outlined in *Casey* and *Cruzan*,[57] the *Glucksberg* Court overruled the en banc Court of Appeals's decision.[58] Although the Court was unanimous in its decision, the plurality opinion[59] is arguably one of the weakest unanimous decisions in American history.[60]

The Supreme Court examined the actual definition of the right to PAS and explained that in substantive-due-process cases, a careful description of the alleged constitutionally protected right is required.[61] The respondents asserted a "liberty to

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52. *Id.* at 839.
53. *Id.*
54. *Glucksberg*, 521 U.S. at 702.
55. *Id.* at 707–08.
56. *Id.* at 708.
57. *See supra* Section I.A.
58. *Glucksberg*, 521 U.S. at 735–36.
59. Chief Justice Rehnquist wrote the majority opinion. *Id.* at 705. Justice O'Connor filed a concurring opinion in which Justices Ginsburg and Breyer joined in part. *Id.* at 736 (O'Connor, J., concurring). In addition, Justices Stevens, Souter, Ginsburg and Breyer filed separate concurring opinions. *Id.* at 738 (Stevens, J., concurring); *id.* at 752 (Souter, J., concurring); *id.* at 789 (Ginsburg, J., concurring); *id.* (Breyer, J., concurring).
60. Yale Kamisar, *Foreword: Can* Glucksberg *Survive* Lawrence*? Another Look at the End of Life and Personal Autonomy*, 106 MICH. L. REV. 1453, 1460 (2008) (reasoning that the Court avoided the real issue of whether a terminally ill person has the right to PAS by simply deciding there is "no general right to enlist the aid of a physician in committing suicide," leading the author to conclude that *Glucksberg* "decided virtually nothing").
61. *Glucksberg*, 521 U.S. at 721.

choose how to die" and a right to "control of one's final days."[62] However, the Court defined the right in question as "whether the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so."[63] The Court distinguished PAS from the right to refuse treatment by asserting that battery laws and legal tradition have historically protected an individual's right to refuse treatment and denounced a right to commit suicide.[64]

Using a two-part test, the Court held that PAS is not a constitutionally protected fundamental right and upheld a Washington law that prohibited PAS.[65] The Court described the test as follows:

> First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are objectively "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest.[66]

Beginning its inquiry by exploring "our Nation's history, legal traditions, and practices," the Court found that suicide and assisted suicide have been consistently criminalized and considered morally unacceptable.[67] The Court discussed American colonists' views on the subject and noted that it was a crime in most states to assist a suicide at the time the Fourteenth Amendment was ratified.[68] Although the Court acknowledged that some states had recently been reexamining the legality of PAS, it specifically used failed attempts in Washington and California to enact legislation as evidence that states were choosing to reaffirm prohibitions.[69] The Court ultimately found that, although "the States [were] currently engaged in serious, thoughtful examinations of physician-assisted suicide," the history and tradition regarding PAS did not support it as a fundamental right.[70]

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62. *Id.* at 722. Respondents also contended that even if the asserted right was not in line with this nation's history and tradition, it was consistent with the Supreme Court's substantive-due-process cases including *Casey* and *Cruzan*. They argued that the wide array of individualist principles protected by American jurisprudence also includes the "liberty of competent, terminally ill adults to make end-of-life decisions free of undue government interference." *Id.* at 724 (citing Brief for Respondents at 10, Washington v. Glucksberg, 521 U.S. 721 (1997) (No. 96-110)).

63. *Id.* at 723.

64. *Id.* at 725; Diana Hassel, *Sex and Death*: Lawrence*'s Liberty and Physician-Assisted Suicide*, 9 U. PA. J. CONST. L. 1003, 1020 (2007).

65. *Glucksberg*, 521 U.S. at 720–21, 735.

66. *Id.* at 720–21 (citations omitted).

67. *Id.* at 710–16.

68. *Id.* at 715.

69. *Id.* at 716–17. Contrary to the Court's rationale, today the trend suggests the opposite, as both Washington and California, as well as five other jurisdictions, have legalized PAS in the years since *Glucksberg*. *See infra* Section I.C.

70. *Glucksberg*, 521 U.S. at 719.

In response to the lower courts' use of *Casey*'s reasoning, the Supreme Court in *Glucksberg* found that the Constitution's protection of many liberties rooted in personal autonomy does not allow for the general conclusion that "any and all important, intimate and personal decisions are so protected."[71] Because the Court determined that there is no fundamental right to PAS, it held that the Constitution only requires that the legitimate government interest be rationally related to the ban on PAS for the prohibition to prevail.[72] For example, the Court determined that Washington's interest in preserving human life, the public-health concerns related to suicide, a need to protect the mentally ill and other vulnerable groups, and the fear that permitting PAS would eventually lead to involuntary euthanasia[73] were all rationally related to Washington's law banning PAS. The Court concluded that the Fourteenth Amendment does not protect a fundamental right for "competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctor."[74]

Legal scholars have expressed disappointment and concern with the weakness of the *Glucksberg* decision.[75] One problem is that the Court may have balked at the real issue—whether a right to PAS exists for a terminally ill, competent person—and instead only addressed the simpler question of whether there is a general right to *suicide* which includes the right to suicide with the assistance of another.[76] For example, at one point, Justice Rehnquist states "the question before us is whether the 'liberty' specially protected by the Due Process Clause includes *a right to commit suicide* which itself includes a right to assistance in doing do."[77] This is misleading.[78] The plaintiffs were not advocating for a "right to commit suicide" in a general sense, nor were they seeking a right to PAS in all cases.[79] Instead, the plaintiffs were claiming a right to PAS in the limited circumstance of

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71. *Id.* at 727–28. The Court is seemingly relying on the fact that PAS is not deeply rooted in American tradition. *See id.*

72. *Id.* at 728.

73. *Id.* at 728–33.

74. *Id.* at 735.

75. Kamisar, *supra* note 60, at 1459–66 (stating that the *Glucksberg* decision "may be the most confusing and the most fragile 9–0 decision in Supreme Court history"); *see also* Hassel, *supra* note 64, at 1018 ("[C]ommentators expressed disappointment that the Court had not done more to establish a clear standard with respect to assisted suicide.").

76. *See* Hassel, *supra* note 64, at 1018–19 (explaining that some commentators suggest that the Court "ducked important questions by refusing to focus narrowly on the specific right asserted: physician-assisted suicide for the terminally ill competent person. Instead, the Court avoided the difficult issue by answering a broader and easier question of whether there is a generalized right to assistance in suicide"); *see also* Robert A. Burt, *Disorder in the Court: Physician-Assisted Suicide and the Constitution*, 82 MINN. L. REV. 965, 965–67 (1998); Martha Minow, *Which Question, Which Lie? Reflections on the Physician-Assisted Suicide Cases*, 1997 SUP. CT. REV. 1, 2.

77. *Glucksberg*, 521 U.S. at 723 (emphasis added).

78. Kamisar, *supra* note 60, 1460–61.

79. *Id.*

terminally ill, competent people.[80] By framing the question the way he did, Justice Rehnquist confused the issue, making the opinion more difficult to understand and weakening its persuasiveness.[81]

Additionally, although the members of the Supreme Court in *Glucksberg* unanimously held the state had legitimate interests in prohibiting PAS, the justices seemed to disagree about whether the right of individuals to control their own deaths is a liberty interest protected under the Due Process Clause.[82] For instance, Justice Stevens stated in his concurrence that, although he believed the state interests were valid in *Glucksberg*, he did not "foreclose the possibility that an individual plaintiff seeking to hasten her death, or a doctor whose assistance was sought, could prevail in a more particularized challenge."[83] Because Justice Stevens believed that Justice Rehnquist had only determined that the statute was constitutional on its face, he did not have to address the constitutionality as applied to the competent, terminally ill people.[84] In addition, Justice O'Connor concluded that, although the Due Process Clause does not protect a generalized right to PAS,[85] she would leave open the question of "whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death."[86]

Justice Souter, too, considered the evolving history of PAS and found that the importance of an individual's right to PAS was "within the class of 'certain interests' demanding careful scrutiny of the State's contrary claim . . . ."[87] He pointed to the similarities between the role of physicians in PAS and abortion cases and explained that "just as the decision about abortion is not directed to correcting some pathology, . . . the decision in which a dying patient seeks help is not so limited. The patients here sought not only an end to pain . . . but [also to] end . . . their short remaining lives with . . . dignity . . . ."[88] Ultimately, Justice Souter found that the state interests in *Glucksberg* were sufficient, so he did not need to address whether the right to PAS was fundamental.[89]

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80. Brief for Respondents at 32, Washington v. Glucksberg, 521 U.S. 702 (1997) (No. 96-110).

81. Kamisar, *supra* note 60, at 1462.

82. *See Glucksberg*, 521 U.S. at 736 (O'Connor, J., concurring); *id.* at 741–42 (Stevens, J., concurring); *id.* at 779–80 (Souter, J., concurring); *see also* Hassel, *supra* note 64, at 1010.

83. *Glucksberg*, 521 U.S. at 750 (Stevens, J., concurring).

84. *Id.* at 739–40; Kamisar, *supra* note 60, at 1464.

85. *See supra* note 76.

86. *Glucksberg*, 521 U.S. at 736–38 (O'Connor, J., concurring).

87. *Id.* at 782 (Souter, J., concurring).

88. *Id.* at 779–80.

89. *Id.* at 782.

C. The States React: Current Physician-Assisted-Suicide Laws Throughout the United States

Although the Supreme Court has determined that PAS is not a fundamental right protected by the U.S. Constitution, PAS is legal in six states[90] and the District of Columbia.[91] Oregon was the first state to legalize PAS.[92] Oregon enacted the Death with Dignity Act in 1997 and it has been implemented as intended for the last 20 years.[93] The act allows capable, terminally ill, adult residents of Oregon to obtain and ingest prescriptions from their physicians to quicken the dying process.[94]

Further, the Montana Supreme Court held that state law did not prohibit a physician from prescribing medication to hasten the death of a terminally ill, mentally competent adult upon request from the patient.[95] The Court found "no indication in Montana statutes that physician aid in dying is against public policy" and went on to say that

> a physician who aids a terminally ill patient in dying is not directly involved in the final decision or the final act. He or she only provides a means by which a terminally ill patient himself can give effect to his life-ending decision, or not, as the case may be. Each stage of the physician-patient interaction is private, civil, and compassionate. The physician and terminally ill patient work together to create a means by which the patient can be in control of his own mortality. The patient's subsequent private decision whether to take the medicine does not breach public peace or endanger others.[96]

Washington voters approved the Death with Dignity Act, allowing competent, terminally ill patients to request life-ending medication from a physician.[97] The Vermont legislature passed the Vermont Patient Choice and Control at the End of

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90. Oregon, Washington, Vermont, Montana, California, and Colorado. OR. REV. STAT. § 127.800 § 2.01(1) (1999); WASH. REV. CODE § 70.245.020 (2009); VT. STAT. ANN. tit. 18, § 5283 (2013); CAL. HEALTH & SAFETY CODE § 443.2 (West 2016); COLO. REV. STAT. ANN. § 25-48-101 (West 2016); Baxter v. State, 224 P.3d 1211 (Mont. 2009).

91. *Take Action: Death with Dignity Around the U.S.*, DEATH WITH DIGNITY, https://www.deathwithdignity.org/take-action/ (last visited Mar. 3, 2018).

92. *Oregon Death with Dignity Act: A History*, DEATH WITH DIGNITY, https://www.deathwithdignity.org/oregon-death-with-dignity-act-history/ (last visited Mar. 14, 2018).

93. According to the most recent statistics, 204 patients received prescriptions under the Death with Dignity Act in 2016, and 133 of those patients actually ingested the medication to hasten their deaths. OR. HEALTH AUTH., PUB. HEALTH DIV., OREGON DEATH WITH DIGNITY ACT: DATA SUMMARY 2016, at 4 (Feb. 10, 2017) https://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Documents/year19.pdf.

94. OR. REV. STAT. § 127.800 § 2.01(1) (1999).

95. *Baxter*, 224 P.3d at 1222 (Mont. 2009).

96. *Id.* at 1217.

97. WASH. REV. CODE § 70.245.020 (2009).

Life Act in 2013 allowing terminally ill, competent patients to receive prescriptions from physicians to aid in ending their lives.[98]

In large part because of Brittany Maynard's story, in June 2016 her home state of California passed the End of Life Options Act allowing terminally ill patients with fewer than six months to live to end their lives with physician assistance.[99] That November, Colorado became the sixth state to legalize PAS for the terminally ill through ballot initiative with 65% of voters favoring the legislation.[100] In February 2017, the District of Columbia enacted a PAS statute.[101]

As of September 2017, 30 other states[102] were considering death with dignity legislation.[103] According to 2017 surveys, over 70% of Americans[104] and a majority of doctors[105] favor legalizing PAS. However, because there is no national legal consensus regarding PAS, many terminally ill patients, like Brittany Maynard, who wish to die with dignity are often required to uproot their families and establish

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98. VT. STAT. ANN. tit. 18, § 5283 (2013).

99. CAL. HEALTH & SAFETY CODE § 443.2 (West 2016); *Brittany's Family Introduces Video Testimony as California Law-Makers Convene on End of Life Option Act*, BRITTANY MAYNARD FUND, http://thebrittanyfund.org/brittanys-family-introduces-video-testimony-as-california-law-makers-convene-on-end-of-life-option-act/ (last visited Mar. 2, 2018).

100. *Proposition 106: Access to Medical Aid-in-Dying Medication*, COLO. GEN. ASSEMBLY (Sept. 12, 2016), http://www.leg.state.co.us/LCS/Initiative%20Referendum/1516initrefr.nsf/b74b3fc5d676cdc987257ad8005bce6a/99fbc3387156ab5c87257fae00748890/$FILE/2015-2016%20145bb.pdf; Jennifer Brown, *Colorado Passes Medical Aid in Dying, Joining Five Other States*, DENVER POST (Nov. 8, 2016, 12:00 PM), http://www.denverpost.com/2016/11/08/colorado-aid-in-dying-proposition-106-election-results/.

101. *District of Columbia*, DEATH WITH DIGNITY, https://www.deathwithdignity.org/states/district-of-columbia/ (last visited Mar. 2, 2018).

102. Alaska, Arizona, Connecticut, Delaware, Hawaii, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Wisconsin, and Wyoming. *Take Action: Death with Dignity Around the U.S.*, *supra* note 91.

103. *Id.*

104. The poll says that "73% of U.S. adults say a doctor should be allowed to end a terminally ill patient's life by painless means if the patient requests it." Jade Wood & Justin McCarthy, *Majority of Americans Remain Supportive of Euthanasia*, GALLUP (June 12, 2017), http://news.gallup.com/poll/211928/majority-americans-remain-supportive-euthanasia.aspx.

105. "For the first time, most U.S. doctors—54 percent—favor aid in dying, backing the rights of patients with an incurable illness to seek 'a dignified death'. . . ." *Most U.S. Doctors Now Support Aid in Dying: Survey*, NBC NEWS (Dec. 16, 2014, 6:10 PM), http://www.nbcnews.com/health/health-news/most-u-s-doctors-now-support-aid-dying-survey-n269691; *see also* April Dembosky, *Doctors' Secret Language for Assisted Suicide*, ATLANTIC (May 27, 2015), http://www.theatlantic.com/health/archive/2015/05/doctors-secret-language-for-assisted-suicide/393968/ (describing the way some doctors in jurisdictions where PAS is not legal hint at or indirectly aid terminally ill people and their families to hasten patients' deaths).

residency in one of the seven jurisdictions that have legalized PAS.[106] Moving to a new state is expensive and arduous for anyone, especially a person who is terminally ill.[107]

To combat this legal patchwork problem, there are three main ways PAS could be legalized nationally. First, the Supreme Court could reexamine the PAS issue considering more recent decisions and rule that it is a constitutionally protected fundamental right.[108] Second, states could adopt uniform statutes legalizing PAS.[109] Third, state supreme courts, like Montana's, could begin to overrule legislative efforts banning PAS, effectively legalizing it in those states.[110] This Note advocates for a Supreme Court decision that would legalize PAS in all 50 states, making death with dignity available to all Americans.

II. ANALOGY TO FUNDAMENTAL RIGHTS ESTABLISHED AFTER *GLUCKSBERG*

When *Glucksberg* was decided in 1997, history and tradition stood at the center of substantive due process.[111] However, that landscape has changed dramatically in recent years[112] toward a renewed appreciation for personhood, autonomy, and dignity that drove the Court in *Casey*.[113]

A. The Evolution of Substantive Due Process: An Examination of Lawrence

In 1986, the Supreme Court in *Bowers v. Hardwick* upheld a Georgia statute that criminalized sodomy and rejected the "fundamental right [of] homosexuals to engage in sodomy."[114] Seventeen years later, the Supreme Court

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106. *FAQs*, DEATH WITH DIGNITY, https://www.deathwithdignity.org/faqs/ (last visited Mar. 2, 2018).

107. *Id.*

108. Christina White, Comment, *Physician Aid-In-Dying*, 53 HOUS. L. REV. 595, 626–27 (2015).

109. *Id.* at 627–28.

110. *Id.* at 628–29.

111. Bradley P. Jacob, *Back to Basics: Constitutional Meaning and "Tradition"*, 39 TEX. TECH L. REV. 261, 282 (2007); *see, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (holding that there is no constitutionally protected right to same-sex sodomy because it is not deeply root in the country's history or traditions), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003); Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (overturning the conviction of a woman living with her son and two grandsons in violation of a statute that narrowly defined the word *family* because the Court said the institution of family is deeply rooted in this nation's history and traditions).

112. Hassel, *supra* note 64, at 1005; Hawkins, *supra* note 17, at 432.

113. *See* Adam Lamparello, *Suicide: A Legal, Constitutional, and Human Right*, 18 TEX. WESLEYAN L. REV. 797, 817–18 (2012); *see also* Kenji Yoshino, Comment, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 158–59 (2015).

114. *Bowers*, 478 U.S. at 189–91. Like *Glucksberg*, the Court in *Bowers* relied on history, tradition and a narrow definition of the right to conclude that same-sex sodomy was not a fundamental right under the Constitution. Hassel, *supra* note 64, at 1012–13; *see also* Belkys Garcia, *Reimagining the Right to Commercial Sex: The Impact of* Lawrence v. Texas *on Prostitution Statutes*, 9 N.Y.C. L. REV. 161, 168 (2005).

overruled *Bowers* and expanded liberty rights in *Lawrence v. Texas*.[115] In *Lawrence*, the Court held that Texas could not prohibit same-sex sodomy because individuals have the right to define the meaning of their lives at the most personal level.[116] The Court expansively reframed the issue as "whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment."[117] This reframing is important because *Bowers* was more consistent with *Glucksberg*'s narrow construction of the right, whereas *Lawrence* defines the right broadly in a way more consistent with *Casey* and *Cruzan*.[118]

Justice Kennedy applied the reasoning from *Casey* to determine that same-sex couples may seek autonomy in their relationships for the same reasons women seek autonomy in their decision to seek abortions. In doing so, he repeated *Casey*'s message that "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."[119] Prohibiting people from engaging in consensual, same-sex intimacy would deny them decisional autonomy in one of the most personal choices they can make. According to the Court: "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places . . . . Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[120]

Lawrence focused on liberty and determined that government intervention is illegitimate because it would "demean [individuals'] existence or control their destiny by making their private sexual conduct a crime."[121] Instead of focusing on the history and tradition of the liberty interest, which Justice Kennedy determined were "the starting point[s] but not in all cases the ending point[s] for substantive-due-process inquiries," *Lawrence* looked toward emerging awareness and new trends of social understanding to determine whether a right is protected.[122]

Lawrence also seems to depart from *Glucksberg*'s requirement of a narrow, careful description of the proposed fundamental right and focuses more on the unfair liberty restriction and the importance of freedom from government interference.[123] In *Lawrence*, the Court rejected *Bowers*'s narrow definition of the right as same-sex sodomy and instead broadened the right to protect "two adults, who, with full and

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115. *Lawrence*, 539 U.S. at 567, 578; Garcia, *supra* note 114, at 168.

116. Hassel, *supra* note 64, at 1005; *see Lawrence*, 539 U.S. at 574.

117. *Lawrence*, 539 U.S. at 564.

118. Hassel, *supra* note 64, at 1013.

119. *Lawrence*, 539 U.S. at 574 (quoting Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992)); *see supra* Section I.B.

120. *Lawrence*, 539 U.S. at 562; *see also* Hassel, *supra* note 64, at 1005.

121. *Lawrence*, 539 U.S. at 578; Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. 415, 424 (2012).

122. *Lawrence*, 539 U.S. at 572 (Justice Kennedy emphasizes the "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.").

123. Hassel, *supra* note 64, at 1006–07.

mutual consent, engaged in sexual practices common to a homosexual lifestyle."[124] The reasoning in *Bowers* was very similar to that in *Glucksberg*, and the definitions of the asserted rights that were considered by the Court largely influenced its decision.[125] Like in *Bowers*, where the Court could not find a specially recognized right to homosexual sodomy in our nation's history or tradition, the *Glucksberg* Court's framing of the issue allowed it to recount the historical rejection of suicide generally.[126] In *Lawrence*, however, the Court adopted an approach that was more focused on weighing the asserted liberty interest against the governmental interests rather than merely determining whether a narrowly defined fundamental right has traditionally been recognized.[127]

The *Lawrence* decision ends by powerfully outlining the limitations of a plain-text reading of the Constitution and invokes the notion that the Constitution is a living document, stating:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[128]

This quote stands in stark contrast to the two-part *Glucksberg* test centered around history and deeply rooted traditions. In *Lawrence*, the Court rejected the historical and traditional focus in *Bowers* and concluded that the *Bowers* Court did not fully appreciate the extent of the liberty interest at stake.[129]

Nevertheless, *Lawrence* left two main questions unanswered.[130] First, the extent of conduct the Court believes is protected from government intrusion is unclear.[131] The protected liberty interest, according to the Court, seems to be some kind of private, adult, consensual, sexual autonomy within a person's home.[132]

The second question involves the standard of review.[133] At times, Justice Kennedy seems to be using heightened scrutiny when he focuses on liberty and cites to cases holding that government interference with constitutionally protected rights

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124. *Lawrence*, 539 U.S. at 578.
125. Hassel, *supra* note 64, at 1013.
126. *See id.* at 1018–19.
127. *See Lawrence*, 539 U.S. at 567.
128. *Id.* at 578–79.
129. *See id.* at 567–68.
130. Robert C. Farrell, *Justice Kennedy's Idiosyncratic Understanding of Equal Protection and Due Process, and Its Costs*, 32 QUINNIPIAC L. REV. 439, 468 (2014).
131. *Id.* at 468; *see also* Jacob, *supra* note 111, at 284.
132. Farrell, *supra* note 130, at 469.
133. *Id.* at 468.

must be narrowly tailored to a compelling interest.[134] But the Court never explicitly says that the conduct protected in *Lawrence* is an implied fundamental right and holds that the government infringement "furthers no legitimate state interest."[135] This language is typically used under rational-basis analysis.[136] Ultimately, most legal scholars and judges have concluded that *Lawrence* neither invokes strict scrutiny nor rational basis, and instead they identify it as a type of intermediate scrutiny or rational basis with bite.[137]

B. Continuing Down the Same Path: Obergefell v. Hodges

In 2015, the Supreme Court held in *Obergefell v. Hodges* that marriage is a fundamental right protected by the Constitution, and same-sex marriage is included in that right.[138] *Obergefell* departs from *Glucksberg*'s two-part test and instead follows the same substantive-due-process reasoning outlined in *Cruzan*, *Casey*, and *Lawrence*, further strengthening the argument that PAS should be deemed a constitutionally protected right.[139] Justice Kennedy wrote the *Obergefell* opinion and described a process for finding new fundamental rights consistent with *Lawrence*.[140] Justice Kennedy started with the history of marriage, provided an in-depth description of the couples involved in the case, and used sympathetic language to describe their respective stories.[141] Unlike in *Glucksberg*, history and tradition were not the endpoint of *Obergefell*'s substantive-due-process analysis.[142] In addition, instead of defining the right narrowly, as required by *Glucksberg*, to apply to only same-sex couples, Justice Kennedy examined the right to marry more generally.[143]

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134. *Id.* at 468–70; Lawrence v. Texas, 539 U.S. 558, 565–66 (2003) (citing Roe v. Wade, 410 U.S. 113 (1973) and Carey v. Population Servs. Int'l, 431 U.S. 678 (1977)).

135. *Lawrence*, 539 U.S. at 578; *see also id.*, 539 U.S. at 599 (Scalia, J., dissenting); Farrell, *supra* note 130, at 471.

136. *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting); Farrell, *supra* note 130, at 471.

137. Farrell, *supra* note 130, at 472 ("The courts of appeals for the First and Ninth Circuits, unsatisfied with either [strict scrutiny or rational basis], determined that Justice Kennedy's opinion embraces some kind of intermediate scrutiny."); Jeremy B. Smith, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769, 2774 (2005) ("Under rational basis with bite, a court, while purporting to use the rational basis test, actually applies some form of heightened scrutiny and invalidates the challenged law after a close examination of the law's purpose and effects.").

138. Obergefell v. Hodges, 135 S. Ct. 2584, 2607–08 (2015).

139. *See generally* Tobias Barrington Wolf, *The Three Voices of* Obergefell, L.A. LAW, Dec. 2015, at 28, 30 (2015); Richard A. Posner, *Eighteen Years On: A Re-Review*, 125 YALE L.J. 533 (2015) (reviewing William N. Eskridge, Jr., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT (1996)).

140. Marie Louise Dienhart, *Case Summary*: Obergefell v. Hodges, 28 REGENT U. L. REV. 163, 180–81 (2016).

141. *Obergefell*, 135 S. Ct. at 2593.

142. *Id.* at 2598.

143. *Id.* at 2602.

Obergefell's inquiry into whether a right is protected departs from *Glucksberg*'s two-part test.[144] Although Justice Kennedy discussed the history and tradition of marriage, he did not remain confined by them. Instead, he illustrated the ways marriage has evolved over time through examples such as the change from arranged marriages to voluntary contracts and the abandonment of covertures due to the improved status of women.[145] Further, he recognized the importance of new insights, stating that the "changed understandings of marriage are characteristic of a nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process."[146] Justice Kennedy also gave an extensive overview of the changes in public opinion surrounding same-sex intimacy and discussed pivotal case law.[147] In addition, he explained the varying conclusions of state and lower federal courts and acknowledged that the states were divided on the issue of same-sex marriage at the time *Obergefell* came before the Supreme Court.[148]

Quoting Justice Harlan's dissent in *Poe v. Ullman*,[149] Justice Kennedy concluded that an important part of the judicial duty is to identify and protect fundamental rights, but it "has not been reduced to any formula."[150] Accordingly, the Court in *Obergefell* used reasoning from *Lawrence* and Justice Harlan's *Poe* dissent,[151] and found that the process of identifying fundamental rights utilizes "broad principles rather than specific requirements."[152] In discussing history's place in the analysis, the Court stated: "History and tradition guide and discipline this

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144. *Id.* at 2598.

145. *Id.* at 2595; *see also* Jack B. Harrison, *On Marriage and Polygamy*, 42 OHIO N.U. L. REV. 89, 142 (2015).

146. *Obergefell*, 135 S. Ct. at 2596.

147. *Id.* at 2596–97.

148. *Id.* at 2597; *see also supra* Section I.B.

149. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). Justice Harlan's dissent in *Poe* was given precedential weight by the majority of the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 848–51 (1992).

150. *Obergefell*, 135 S. Ct. at 2598; *see also* Yoshino, *supra* note 113, at 159.

151. In his *Poe* dissent, Justice Harlan discusses the process for identifying fundamental rights and explains that

> [d]ue process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for liberty of the individual, has struck between that liberty and the demands of organized society . . . . The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

Poe, 367 U.S. at 542 (Harlan, J., dissenting).

152. *Obergefell*, 135 S. Ct. at 2598.

inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present."[153]

Echoing his own language in *Lawrence*, Justice Kennedy again explained that the creators of the Bill of Rights and the Fourteenth Amendment did not claim to understand the whole scope of freedom in its entirety.[154] Rather, "they entrusted to future generations a character protecting the right of all persons to enjoy as we learn its meaning."[155] In addition, Justice Kennedy reasoned that although the history of excluding same-sex couples from marriage "may long have seemed natural and just, . . . its inconsistency with the central meaning of the fundamental right to marry is now manifest."[156]

Justice Kennedy analyzed four principles and traditions which prove that marriage for all couples is a fundamental right under the Constitution.[157] First, in *Obergefell*, as in *Lawrence* and *Casey*, the Court emphasized the importance of intimacy and dignity.[158] The Court noted that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy."[159] Under this premise, the Court found that "decisions concerning marriage are among the most intimate that an individual can make."[160] According to the Court, the fact that marriage shapes an individual's destiny and "fulfills yearnings for security, safe haven, and connection that express our common humanity" is determinative for recognizing a fundamental right to marry for same-sex couples.[161] The Court focused on the dignity of the same-sex couples and considered the decision of who to marry to be one of the most profound choices.[162]

Building on the importance of autonomy, the second principle was that the right to marry is fundamental because it is a personal choice between two people "unlike any other in its importance to the committed individuals."[163] Justice Kennedy states: "Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other."[164] The third principle for safeguarding the right to marry was related

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153. *Id.* at 2598 (citation omitted).

154. *Id.* at 2598; *see also supra* Section II.A.

155. *Obergefell*, 135 S. Ct. at 2598 ("When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.").

156. *Id.* at 2602.

157. *Id.* at 2599–2601; *see also* Dienhart, *supra* note 140, at 180–81.

158. *Obergefell*, 135 S. Ct. at 2599.

159. *Id.*

160. *Id.*

161. *Id.* (quoting Goodridge v. Dep't Pub. Health, 798 N.E.2d 941, 955 (Mass. 2003)).

162. *Id.*

163. *Id.*; *see also* Wolf, *supra* note 139, at 29.

164. *Obergefell*, 135 S. Ct. at 2600; *see also* Nora Markard, *Dropping the Other Shoe:* Obergefell *and the Inevitability of the Constitutional Right to Equal Marriage*, 17 GERMAN L.J. 509, 512 (2015).

to protecting children and eliminating the stigma around same-sex families.[165] With this concern for children in mind, the Court explained that it is important for children to understand the integrity and closeness of their own family situations and found that "[w]ithout the recognition, stability, and predictability marriage offers, [same-sex couples'] children suffer the stigma of knowing their families are somehow lesser."[166] Finally, the fourth principle the Court discussed was the importance of marriage as a "keystone of our social order" and as a "building block of our national community."[167]

In *Obergefell*, the Supreme Court acknowledged the apparent inconsistencies between its conclusion and *Glucksberg*.[168] The Court first explained the *Glucksberg* two-part test's need for both a careful description of the fundamental right and for the right to be rooted in history and tradition.[169] However, without explaining its reasoning, the Court then tersely stated that the test did not apply to same-sex marriage: "Yet while that approach *may have been* appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy."[170]

The Court found that previously decided marriage and intimacy-related cases inquired about rights in a more comprehensive sense and asked if there was a sufficient justification for restricting the right to marriage to certain people.[171] As part of its analysis, the Court stated: "If rights were defined by who exercised them in the past, then received practices could serve as continued justification and new groups could not invoke rights once denied."[172] The Court also explained the relationship between the Due Process Clause and the Equal Protection Clause and described the connectedness of liberty and equality.[173]

Lastly, *Obergefell* rejects the argument that the same-sex-marriage issue should be left to the political process.[174] The Court discussed the increase in public support and understanding regarding same-sex marriage in recent years but ultimately held that "[t]he dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right."[175] In

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165. *Obergefell*, 135 S. Ct. at 2600; *see also* Markard, *supra* note 164, at 513.
166. *Obergefell*, 135 S. Ct. at 2600.
167. *Id.* at 2601.
168. *Id.* at 2602; *see also* Wolf, *supra* note 139, at 33.
169. *Obergefell*, 135 S. Ct. at 2602; *see supra* Section I.B.
170. *Obergefell*, 135 S. Ct. at 2602 (emphasis added).
171. *Id.*; *see also* Dienhart, *supra* note 140, at 180–81.
172. *Obergefell*, 135 S. Ct. at 2602.
173. *Id.* at 2602–04 ("[R]ights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other" and that "one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right.").
174. *Id.* at 2605.
175. *Id.*

concluding that same-sex couples have a constitutionally protected right to marry, the Court found that denying them that right would "disparage their choices and diminish their personhood."[176]

C. The New Substantive-Due-Process Test: Three Guiding Principles

The current test for identifying fundamental rights is somewhat unclear after *Lawrence* and *Obergefell*. *Lawrence* is over a decade old, yet legal scholars and judges alike still struggle to fully understand and apply it.[177] Despite having joined the *Glucksberg* plurality in full, Justice Kennedy blatantly omitted any mention of the *Glucksberg* test in his *Lawrence* opinion, leaving the status of *Glucksberg* unknown.[178] Moreover, because the *Obergefell* decision is so recent, its full effect is undetermined.[179] In *Obergefell*, Justice Kennedy could have incorporated the *Glucksberg* view of tradition into his analysis, but he did not.[180] Although the right of same-sex couples to marry is not deeply rooted in this nation's history and tradition, the right to marry definitively is.[181] Justice Kennedy could have used that tradition to keep *Glucksberg* intact, but instead he chose to address the role that tradition should play in the substantive-due-process analysis head on.[182] The rest of this Note grapples with what the new substantive-due-process test looks like and how it could be applied to PAS.

In light of *Lawrence* and *Obergefell*, this Note proposes three main principles of new substantive-due-process jurisprudence. First, while history and tradition remain an important factor to consider, they are now the beginning—and not the end—of the analysis.[183] After *Obergefell*, tradition becomes the starting point, but it plays a less defined role than it did under the *Glucksberg* test.[184] The new test puts more weight on "emerging awareness" than on deeply rooted beliefs.[185]

Second, while the *Glucksberg* test requires a careful description of the right in question, the new test allows for a broader definition of the right.[186] Without the careful-description requirement, the substantive-due-process analysis can now move to defining the right in question more generally to be part of the liberty that due process protects.[187] By shifting the focus to liberty, the Court can stray away from

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176. *Id.* at 2602.
177. *See supra* Section II.A.
178. Yoshino, *supra* note 113, at 154.
179. *See* Lee-ford Tritt, *Moving Forward by Looking Back: The Retroactive Application of* Obergefell, 2016 WIS. L. REV. 873, 875 (2016).
180. Yoshino, *supra* note 113, at 163.
181. *See Obergefell*, 135 S. Ct. at 2599 (quoting Loving v. Virginia, 388 U.S. 1, 12 (1967)); Yoshino, *supra* note 113, at 163.
182. Yoshino, *supra* note 113, at 163.
183. Lamparello, *supra* note 113, at 816.
184. Yoshino, *supra* note 113, at 164.
185. *See* Garcia, *supra* note 114, at 169.
186. Yoshino, *supra* note 113, at 166.
187. *Id.*

an unenumerated-rights analysis, and instead it can move to an interpretation of the enumerated right of liberty.[188]

Lastly, these cases are concerned with protecting the dignity, personal autonomy, and privacy of individuals while balancing these values against state interests.[189] In addition, they reject morality and animus as bases for decision-making.[190] The reasoning in the *Lawrence* and *Obergefell* cases instead harkens back to Justice Harlan's dissent in *Poe v. Ullman*, asserting there is no formula for discovering fundamental rights.[191]

III. RECOGNIZING PHYSICIAN-ASSISTED SUICIDE AS A FUNDAMENTAL RIGHT

Considering the new substantive-due-process analyses outlined in *Lawrence* and *Obergefell*, which focus less on history and tradition and more on decisional autonomy and dignity, the Supreme Court should recognize PAS as a fundamental right that the Constitution protects. Considering the framework outlined in these new cases, the Ninth Circuit's decision in *Compassion in Dying* may have been correct all along.[192] In other words, the Ninth Circuit's use of *Casey* and *Cruzan* to hold that PAS is a decision so fundamental to a patient's personhood and dignity that governmental interference is inappropriate mirrors the holdings in *Lawrence* and *Obergefell*.

A. The Three Guiding Principles of Lawrence *and* Obergefell *Applied to Physician-Assisted Suicide*

1. History and Tradition as the Beginning and Not the End: An Emerging Awareness in Favor of Physician-Assisted Suicide

If the Supreme Court heard a case that involved competent, terminally ill plaintiffs seeking the right to PAS in this new era of substantive due process, the Court's analysis would look very different than it did in *Glucksberg*.[193] First, the landscape of PAS laws has changed throughout the country in the 20 years since *Glucksberg* was decided.[194] In *Glucksberg*, the Court relayed this country's long history of anti-suicide laws and moral condemnation of ending one's own life dating back to the colonists.[195] The Court also considered how, at the time of the decision,

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188. *Id.*

189. Garcia, *supra* note 114, at 171; Anna K. Christensen, *Equality with Exceptions? Recovering* Lawrence*'s Central Holding*, 102 CAL. L. REV. 1337, 1348 n.90 (2014); *see generally* Yoshino, *supra* note 113.

190. *See* Christensen, *supra* note 189, at 1348; Garcia, *supra* note 114, at 171.

191. Yoshino, *supra* note 113, at 149.

192. *See supra* Section I.A (discussing Compassion in Dying v. Washington, 79 F.3d 790 (9th Cir. 1996)).

193. *See generally* Kamisar, *supra* note 60; Lamparello, *supra* note 113; Pailet, *supra* note 45.

194. *See supra* Section II. Interestingly, *Bowers* was overruled by *Lawrence* 17 years after it was decided. Eric Berger, Lawrence*'s Stealth Constitutionalism and Same-Sex Marriage Litigation*, 21 WM. & MARY BILL RTS. J. 765, 773 (2013).

195. *See supra* Sections I.A–B.

the states considering PAS legislation chose not to implement it.[196] The Court specifically discussed Washington and California due to their failed attempts to enact PAS legislation, but both have since legalized PAS.[197]

Instead of focusing on whether PAS is deeply rooted in our nation's history and traditions, the Court should now consider the "emerging awareness" and more recent trends of PAS support.[198] Like in *Lawrence*, where the states prohibiting same-sex sodomy had reduced from 25 to 13 after *Bowers* was decided,[199] here, in the years since *Glucksberg*, 6 states and the District of Columbia have legalized PAS for terminally ill, competent people, and many more are currently considering legislation.[200]

In addition, both *Lawrence* and *Obergefell* reasoned that the Constitution is a living document and that the authors intended that future generations would discover fundamental rights based on the truths of their generations.[201] Some legal scholars have suggested that the PAS issue was not ripe at the time of *Glucksberg*, and the confusing nature of the decision is a signal that the issue needed to be developed more at the state level before the Supreme Court could rule in favor of PAS.[202] Within the next few years, the cultural climate of the United States may suggest that anti-PAS laws, like the anti-sodomy laws and prohibitions on same-sex marriage before them, are oppressive and should be abolished.[203]

2. A Broader Definition of the Right to Physician-Assisted Suicide

Although *Glucksberg*'s narrow framing requirement has been rendered less important by more recent cases,[204] how the right is defined may still determine the outcome. As stated in Section I.B, the Court in *Glucksberg* was relatively vague about the exact right it rejected.[205] Specifically, Justices O'Connor, Stevens, and Souter concluded there was simply no right to suicide, and therefore, they did not need to address whether a specific right for terminally ill, competent adults to be aided by a physician in ending their lives existed.[206]

Lawrence's rejection of the narrow right of same-sex sodomy, as framed in *Bowers*, in favor of protecting the broader right of "two adults, who, with full and mutual consent from each other, engaged in sexual practices common to a

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196. *See supra* Section I.C.
197. *See supra* Section I.C.
198. *See* Garcia, *supra* note 114, at 169.
199. *See* Murray Dry, *The Same-Sex Marriage Controversy and American Constitutionalism: Lessons Regarding Federalism, the Separation of Powers, and Individual Rights*, 39 VT. L. REV. 275, 296 (2014).
200. *See supra* Section I.C.
201. *See supra* Section II.A.
202. Burt, *supra* note 76, at 975.
203. *See supra* Section II.A.
204. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting) (critiquing the *Lawrence* majority, in part, for not applying the standards outlined in *Glucksberg*); Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015).
205. *See supra* Section I.B.
206. *See supra* Section I.B.

homosexual lifestyle"[207] further illustrates this point. Thus, instead of defining the right as the ability to commit or have assistance in committing suicide, as the *Glucksberg* court did, reframing it as "the right of a terminally ill, competent adult to obtain life-ending medication from a willing physician without governmental intrusion"[208] should lead to a different result.

3. Dignity and Personal Autonomy Are Directly Connected to Physician-Assisted Suicide

The values that animate the new fundamental-right jurisprudence are equally implicated by the right of a terminally ill, competent adult to obtain life-ending medication from a physician. The main themes found throughout *Lawrence* and *Obergefell*, as well as those in *Cruzan* and *Casey*, include dignity,[209] autonomy in personal and intimate decisions,[210] control over bodily integrity,[211] and preventing stigma.[212] In addition, these cases clearly reject moral condemnation and animus as bases for judicial decision-making.[213] These concepts are connected to PAS. Dignity is at the center of the debate surrounding PAS, and many of the enacted and proposed

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207. *Lawrence*, 539 U.S. at 578.

208. *See supra* Section I.B.

209. Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015) ("They ask for equal dignity in the eyes of the law. The Constitution grants them that right."); *Lawrence*, 539 U.S. at 558 ("When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992) ("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.").

210. *Obergefell*, 135 S. Ct. at 2599 ("There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices."); *Lawrence*, 539 U.S. at 562 ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."); *Casey*, 505 U.S. at 851 ("The doctor-patient relation does not underlie or override the two more general rights under which the abortion right is justified: the right to make family decisions and the right to physical autonomy.").

211. *Casey*, 505 U.S. at 896 ("The effect of state regulation on a woman's protected liberty is doubly deserving of scrutiny in such a case, as the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman."); Cruzan *ex rel.* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 269 (1990) ("This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment.").

212. *Obergefell*, 135 S. Ct. at 2602 (noting that "laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter"); *Lawrence*, 539 U.S. at 560 (explaining that the stigma the Texas criminal statute creates is not trivial, and that "[a]lthough the offense is but a minor misdemeanor, it remains a criminal offense with all that imports for the dignity of the persons charged, including notation of convictions on their records and on job application forms, and registration as sex offenders under state law").

213. Garcia, *supra* note 114, at 169; Christensen, *supra* note 189, at 1348.

bills relating to PAS reference dignity in the title.[214] Death by terminal illness can be excruciatingly painful, and patients may lose all recognizable parts of themselves before the disease ends their lives.[215] Decisions regarding sexual partners and spouses are deeply connected to the concept of dignity, but the way a person dies is just as, if not more, fundamental to personhood.[216] Patients with terminal illnesses do not want to die, but they are dying. Legalizing PAS would help these people die with dignity.[217]

Much of the language employed in *Lawrence* and *Obergefell* can be applied to PAS. The mystery-of-human-life passage[218] from *Casey* that was echoed again in *Lawrence* applies directly to PAS because the way a person dies is inextricably linked to dignity and personal autonomy.[219] Indeed, the majority of patients who choose to end their lives by PAS in states that allow it note that they are doing so to exercise autonomy and personal control.[220] As in *Lawrence* with same-sex intimate relations, government intrusion into and the criminalization of people's private decisions to end their own lives with physician assistance would "demean their existence or control their destiny" unconstitutionally.[221]

The main principles discussed in *Obergefell* that led to the Court's decision that marriage, including same-sex marriage, is a fundamental right also relate to PAS.[222] First, Justice Kennedy describes marriage as "among the most intimate [decisions] that an individual can make," and states that the security marriage brings allows couples to "express [their] common humanity."[223] Death too is a trait shared by all humanity, and although it would be a much more somber level of security, allowing terminally ill individuals to end their lives before disease ravages their bodies and minds would give them much-deserved dignity.[224]

Moreover, the second principle relied on in *Obergefell*, that marriage is unlike any other commitment, applies to PAS. Justice Kennedy asserts that humans have a universal fear of being alone and left with no assurance that someone will be

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214. *See, e.g.*, OR. REV. STAT. § 127.800 (1996) (titled Death with Dignity Act); WASH. REV. CODE § 70.245 (2009) (same).

215. *Care Through the Final Days*, CANCER.NET, http://www.cancer.net/navigating-cancer-care/advanced-cancer/care-through-final-days (last visited Jan. 14, 2017).

216. *See generally* Lamparello, *supra* note 113.

217. *See generally* Katherine A. Chamberlain, *Looking for a "Good Death": The Elderly Terminally Ill's Right to Die by Physician-Assisted Suicide*, 17 ELDER L.J. 61 (2009); Browne C. Lewis, *A Graceful Exit: Redefining Terminal to Expand the Availability of Physician-Assisted* Suicide, 91 OR. L. REV. 457 (2012); White, *supra* note 108.

218. Lawrence v. Texas, 539 U.S. 558, 574 (2003) (quoting Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992)); *see supra* Section I.B.

219. *See* Lamparello, *supra* note 113, at 818–21.

220. *See, e.g.*, *End-of-Life Issues and Care*, AM. PSYCHOL. ASS'N, http://www.apa.org/topics/death/end-of-life.aspx (last visited Mar. 2, 2018).

221. *Lawrence*, 539 U.S. 558, 578 (2003).

222. Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

223. *Id.* at 2589–99.

224. Chamberlain, *supra* note 217, at 62.

there to care for them.[225] If the values of hope and assurance make marriage such an important union, the relationship between physicians and their dying patients have similar characteristics that warrant protections. The unfortunate truth is that terminally ill patients in 44 of the 50 states call out in pain from their incurable illnesses only to find that no one can fully help them.[226] If PAS were available to terminally ill people, that knowledge would give dying patients' peace of mind in their most vulnerable times of need.[227]

The third principle outlined in *Obergefell*, and touched on in the other substantive-due-process cases, is the desire to eliminate stigma for the individuals and their families.[228] Justice Kennedy was concerned that failing to legitimize same-sex marriage would cause the children of same-sex couples to grow up thinking they are inferior.[229] While the stigma surrounding same-sex marriage has lessened over the years, the stigma regarding suicide has stayed the same.[230] Death is something Americans find difficult to talk about.[231] If PAS was made legal, it would promote a more open dialogue regarding end-of-life decisions that could work to reduce the stigma surrounding suicide for patients and their families. Regardless, animus and moral disapproval of an act are not sufficient reasons for it to be excluded from constitutional protection.[232]

Lastly, opponents of a right to PAS for competent, terminally ill patients say that the decision should be left to the states.[233] Justice Kennedy considered and rejected this argument as it applied to same-sex marriage, and the same reasoning applies to PAS.[234] Ultimately, Justice Kennedy stated that individuals do not need to wait for legislation before asserting a fundamental right.[235] Like the laws deemed unconstitutional in *Lawrence* and *Obergefell*, denying patients access to PAS would similarly "disparage their choices and diminish their personhood."[236]

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225. *Obergefell*, 135 S. Ct. at 2600.

226. *See supra* Section I.C.

227. *See* Chamberlain, *supra* note 217, at 62.

228. *Obergefell*, 135 S. Ct. at 2600.

229. *Id.*

230. *Compare* Justin McCarthy, *American's Support for Gay Marriage Remains High at 61%*, GALLUP (May 19, 2016), http://www.gallup.com/poll/191645/americans-support-gay-marriage-remains-high.aspx, *with* Kristina Cowan, *Suicide and Its Unrelenting Stigma*, HUFFINGTON POST: THE BLOG (Mar. 28, 2015), http://www.huffingtonpost.com/kristina-cowan/suicide-and-its-unrelenti_b_6543364.html.

231. *See, e.g.*, Emily Rappleye, *National Healthcare Decisions Day: 11 Statistics On End-Of-Life Decision Making*, BECKER'S HOSP. REV. (Apr. 16, 2015), http://www.beckershospitalreview.com/hospital-physician-relationships/national-healthcare-decisions-day-11-statistics-on-end-of-life-decision-making.html ("Only 20 percent of Americans have an advanced directive documenting their wishes for end-of-life medical care."); *End-of-Life Issues and Care*, *supra* note 220.

232. *See supra* note 209.

233. Kamisar, *supra* note 60, at 1469.

234. *Obergefell*, 135 S. Ct. at 2605.

235. *Id.*; *see also supra* Section II.B.

236. *Obergefell*, 135 S. Ct. at 2602; *see supra* Section II.B.

B. Proposed Implementation of Physician-Assisted Suicide Nationwide, Modeled After Casey *and* Cruzan, *With an Eye Towards Balancing State Interests*

Although much of the reasoning from *Lawrence* and *Obergefell* can directly apply to PAS, the application and implementation of pro-PAS legislation would be significantly more complicated. Like in abortion cases, states have a legitimate and significant interest in protecting the lives, health, and welfare of their citizens.[237] Opponents of PAS frequently cite a lack of an obvious stopping point as a reason why PAS laws would result in a slippery slope.[238] These critics argue that the right to PAS would not be confined to terminally ill people and that legalization could lead to voluntary and involuntary euthanasia of vulnerable people.[239] However, many critics of abortion had similar concerns; mainly that its legalization could lead to the acceptance of infanticide, yet its implementation has not led to the catastrophic results some feared.[240]

On the other side of the spectrum, some people who vigorously support autonomous decision-making related to one's own death struggle with two main concerns: (1) the limitation of PAS to the terminally ill and the exclusion of patients who are gravely ill but are not close to death; and (2) the limitation of PAS to suicide administered by patients themselves and the exclusion of patients who would otherwise qualify but cannot self-administer lethal medication.[241] Although some of these concerns are valid, we cannot forgo progress in search of perfection. This Note is not advocating for an unregulated right to PAS, rather it argues that nationwide PAS laws for competent, terminally ill people could be modeled after current abortion law as well as current state PAS legislation.

Abortion and PAS have many similar characteristics. They both involve the termination of life, whether actual or potential, as well as the need for assistance from a third party in doing so.[242] Moreover, the state has compelling interests in both circumstances to ensure safe implementation and to protect against potential abuse.[243] In *Roe v. Wade*, the Court held that "the right of personal privacy includes the abortion decision," but this decision is not "unqualified and must be considered against important state interests in regulation."[244] The Court's trimester system

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237. *See* Chamberlain, *supra* note 217, at 63 n.15; Lamparello, *supra* note 113, at 817–18.

238. *See, e.g.*, Kamisar, *supra* note 60, at 1471–75; Kenneth Klothen, *Tinkering with the Legal Status Quo on Physician Assisted Suicide: A Minimalist Approach*, 14 RUTGERS J.L. & RELIGION 361, 368 (2013).

239. *See* Kamisar, *supra* note 60, at 1471–75; Klothen, *supra* note 238, at 368.

240. *See, e.g.*, Eric Lode, *Slippery Slope Arguments and Legal Reasoning*, 87 CAL. L. REV. 1469, 1481–85 (1999).

241. Klothen, *supra* note 238, at 365.

242. *See generally* Pailet, *supra* note 45.

243. *See generally id.*

244. Roe v. Wade, 410 U.S. 113, 154 (1973).

provided some guidance relating to when a state can interfere to prevent a person from making an end-of-life decision regarding a viable life.[245]

In *Casey*, the Court upheld the central holding in *Roe*, but further refined the test for when state intervention is appropriate.[246] Considering that a woman seeking an abortion "is subject to anxieties, to physical constraints, to pain that only she must bear," the Court reasoned that "[h]er suffering is too intimate and personal" for the state to force her to fulfill its own vision of her role.[247] "The destiny of a woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society."[248] Based on this reasoning, the Court held that a state cannot place an "undue burden" on a woman's right to an abortion prior to viability, because "the urgent claims of the woman to retain ultimate control over her destiny and her body" are "implicit in the meaning of liberty."[249] Under *Casey*, "[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability."[250]

PAS laws, like abortion laws, would have to carefully balance the legitimate state interests with the important dignity, autonomy, and privacy concerns of individuals. For example, the PAS laws could require that for terminally ill, competent people, like pre-viability abortion candidates,[251] the state cannot place an undue burden on the patient seeking access to PAS. For other patients who are not terminally ill, competent people, the state could regulate in accordance with its interests, as it can for women seeking post-viability abortions.[252] As with abortion law, determinations regarding whether a regulation places an undue burden on the patient would need to be done on a case-by-case basis.[253]

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245. Lamparello, *supra* note 113, at 807; Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 878–79 (1992).

246. *Casey*, 505 U.S. at 878–79; *see also* Lamparello, *supra note* 113, at 811–12.

247. *Casey*, 505 U.S. at 852 (1992).

248. *Id.*

249. *Id.* at 869; Lamparello, *supra* note 113, at 814.

250. *Casey*, 505 U.S. at 837.

251. *Id.* In the context of pre-viability abortion, the state's legitimate interests in protecting potential life and the mother's health are outweighed by the woman's right to choose, and the state can only regulate pre-viability abortion if the regulation does not place an undue burden on the woman's ability to obtain an abortion. *Id.* Similarly, with PAS, a competent, terminally ill patient's right to make the intimate decision to end their own life should be protected over any legitimate interest the state may have in regulating PAS.

252. *Id.* In the context of post-viability abortions, the state's interest in protecting the unborn child increases and supersedes the rights of the abortion candidate, and therefore, the state can prohibit post-viability abortions unless the mother's life is in danger. *Id.* Similarly, with PAS, the rights of patients who are not competent or terminally ill are outweighed by the legitimate state interest of protecting its citizens, and the state could regulate PAS in this context as it sees fit.

253. *See* Linda J. Wharton et al., *Preserving the Core of* Roe*: Reflections on* Planned Parenthood v. Casey, 18 YALE J.L. & FEMINISM 317, 353 (2006).

CONCLUSION

Now, more than ever, substantive-due-process jurisprudence is positioned to recognize PAS as a fundamental right. *Lawrence* and *Obergefell* continue the path of *Casey*, *Cruzan*, and *Compassion in Dying* that *Glucksberg* interrupted. The shift away from a rigid examination of history and tradition, with more focus toward emerging awareness, will make it easier for the Court to acknowledge PAS as a fundamental right for terminally ill, competent people. In addition, the reduced emphasis on the description of the right will also be favorable to PAS. Lastly, PAS embodies the essential concepts valued by more recent cases including dignity, personal autonomy in decision-making, privacy, and liberty. Using the undue-burden test as a guide, the Court could construct a PAS framework that would allow states to perform their essential safeguard functions while also supporting the dignity, autonomy and privacy of terminally ill, competent people.