

**ASSISTED SUICIDE: IS THERE A RIGHT TO DIE WITH
DIGNITY, OR ONLY A DUTY TO LIVE IN PAIN?**

Brandon Sheffert*

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* J.D. 2022, Vermont Law School; B.S., Chemistry 2019, University at Buffalo; B.A., Philosophy 2019, University at Buffalo. I would like to thank Professor Greg Johnson for his help throughout the entire writing process. I also want to thank the *Vermont Law Review* staff for all their helpful comments.

INTRODUCTION

Imagine, if you will, a world where medicine prolongs life beyond its natural span, keeping patients alive to suffer until their death. Day-by-day these patients experience more and more pain until finally death's embrace releases them from their perpetual state of agony. As dystopian as this sounds, patients denied the right to assisted suicide experience this every day.

In *Washington v. Glucksberg*, the right to assisted suicide was denied fundamental liberty interest status.¹ The Court claimed that protecting vulnerable patients justified denying assisted suicide as a fundamental right.² The Court in its decision was trying to achieve an ethical result; instead, the decision caused unknowable suffering in the lives of countless patients. This should not be surprising; as Lao-tzu famously said, "Try to make people happy, and you lay the groundwork for misery."³

This Note will compare the *Glucksberg* analysis with other fundamental rights cases. Part I of this Note will discuss fundamental rights jurisprudence and introduce the *Glucksberg* case. Part I also discusses some possible limitations on the right to assisted suicide. Then, Part II will compare the test used in *Glucksberg* to three other fundamental rights tests. First, Part II compares *Glucksberg* with the broad historic test. Second, Part II compares *Glucksberg* with the changing conscience of society test. Afterwards, Part II utilizes a variation of this test to argue that societal changes since *Glucksberg* justify overturning that precedent. Third, Part II compares *Glucksberg* with the penumbra of rights test. Finally, after arguing for the right to assisted suicide, Part III will propose a new fundamental rights test.

¹ *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997).

² *Id.* at 730–31.

³ LAO-TZU, TAO TE CHING 58 (Stephen Mitchell trans., Harper & Row 1988).

I. BACKGROUND

A. Fundamental Rights Jurisprudence

The Due Process Clause of the Fourteenth Amendment is the legal apparatus that enshrines fundamental rights.⁴ The Due Process Clause protects certain fundamental rights and liberties against government interference.⁵ The Supreme Court has long held a right to be fundamental if it is “deeply rooted in this Nation’s history and tradition,”⁶ and “‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’”⁷

To determine whether a right is deeply rooted in the history and traditions of the United States, the Supreme Court must approach fundamental rights from an objective position.⁸ This entails defining fundamental rights “not from drawing arbitrary lines but rather from careful ‘respect for the teachings of history and solid recognition of the basic values that underlie our society.’”⁹ In other words, fundamental rights are derived from history or the American conscience, without regard for the Justices’ personal opinions.¹⁰ The Court generally uses one of three tests to determine whether a right is fundamental.

First, there is the broad historic test, which looks at American history and traditions to justify an asserted right.¹¹ Under this test, if citizens were traditionally allowed to exercise an asserted right, that right will be ranked fundamental.¹² In *Loving v. Virginia*, for example,

⁴ *Glucksberg*, 521 U.S. at 719 (citing *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)).

⁵ *Id.* at 720 (citing *Reno v. Flores*, 507 U.S. 292, 301–02 (1993)).

⁶ *Id.* at 721 (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)).

⁷ *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937)).

⁸ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992) (“Our obligation is to define the liberty of all, not to mandate our own moral code.”).

⁹ *Moore*, 431 U.S. at 503 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)).

¹⁰ *Casey*, 505 U.S. at 850.

¹¹ See generally *Cruzan v. Mo. Dep’t of Health*, 497 U.S. 261, 269–77 (1990) (granting the right to remove life-sustaining equipment, based on historical recognitions of the right to informed consent and the right to abstain from eating and drinking to sustain life); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (determining that the traditions of the United States justified the right to interracial marriage).

¹² *Loving*, 388 U.S. at 12.

interracial marriage was declared a fundamental right.¹³ The Court reasoned that there was a right to marry embedded in the history and traditions of the United States.¹⁴

Loving acknowledged that the specific asserted right to interracial marriage had not at that point been widely practiced in the United States.¹⁵ However, the analysis did not consider only the historical practice of interracial marriage. Instead, the analysis looked to the general history of marriage in the United States.¹⁶ The Court saw marriage as a strong union between a man and woman, based on personal autonomy and love, and included interracial marriage in that tradition.¹⁷

Second, the changing conscience of society test looks to see if an asserted right is fundamentally grounded in the ever-changing American conscience.¹⁸ *Obergefell v. Hodges* used this test to declare same-sex marriage a fundamental right.¹⁹ Although prohibiting same-sex marriage had been the status quo, the conscience of America demanded change.²⁰

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. . . . If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and groups could not invoke rights once denied.²¹

This test recognizes that the public's perception regarding fundamental rights is never stagnant. Cases concerning abortion, for example, have

¹³ *Id.*

¹⁴ *See id.* (declaring marriage vital to a person's pursuit of happiness and essential to the idea of personal autonomy).

¹⁵ *Id.* at 6–7.

¹⁶ *Id.* at 12.

¹⁷ *Id.*

¹⁸ *See Obergefell v. Hodges*, 576 U.S. 644, 671–72 (2015) (recognizing that the public conscience is constantly changing, and fundamental rights analysis should reflect a changing society).

¹⁹ *Id.* at 681.

²⁰ *Id.* at 675.

²¹ *Id.* at 670–71.

been known to employ a variation of the changing conscience test. The Court in *Roe v. Wade* discussed why abortion used to be prohibited, and why those objections no longer held weight against abortion.²² Two of the reasons for prohibiting abortions were Victorian discouragement of sexual conduct and the inherent dangers of abortions.²³ However, since these objections no longer justified prohibiting abortions, the Court saw this change in circumstance as reason to declare abortion a fundamental right.

Moreover, one can see another variation of this test in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. *Casey* created a four-part test to overrule precedent: (1) has the precedent become unworkable; (2) would overturning cause inequity to those relying on the rule; (3) has the law become an anachronism; and (4) have facts changed to render the conclusion irrelevant.²⁴ This test is another way of looking to see how the public's conscience has changed since a prior ruling.

Third, the penumbra of rights test examines if an asserted right can be derived from some principal right protected by the Constitution.²⁵ For instance, the Court in *Griswold v. Connecticut* determined that the Bill of Rights guaranteed the right to privacy.²⁶ The decision derived the right to privacy from the First, Third, Fourth, Fifth, and Ninth amendments.²⁷ Prohibiting married couples from using contraceptives, the Court declared, was an infringement on the right to privacy.²⁸

The penumbra of rights test ensures certain liberties are not wrongly prohibited. For example, any law that prohibits contraceptives invades upon personal privacy.²⁹ In the penumbra of rights cases, the Court has stated that rights would not be adequately guaranteed if

²² *Roe v. Wade*, 410 U.S. 113, 148 (1973).

²³ *Id.*

²⁴ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992).

²⁵ *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

²⁶ *Id.*

²⁷ *Id.* at 484.

²⁸ *Id.* at 485.

²⁹ *See id.* (granting married couples the fundamental right to use contraceptives); *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972) (extending the right to use contraceptives to non-married couples under the Equal Protection Clause).

certain activities were prohibited.³⁰ Various principal rights will only retain meaning if certain practices are ranked fundamental.³¹

B. Definitions

This Note argues for a broadly defined right to assisted suicide. The right argued for in this Note encompasses many ways to die by suicide; however, certain arguments throughout this Note are more narrowly tailored. Therefore, this section will clarify and define various terms that will be showcased throughout this Note.

Setting limitations on the right to die by suicide is outside the scope of this Note. Rather, this Note argues that each individual should be able to make the choice to die by suicide. This Note argues that individuals have a fundamental right to die by suicide, but this Note will not speculate on when and how that right should be administered.

This Note argues that every individual has the right to die. If one has the right to die then they also have the right to die by suicide. Of course, if one has the right to die by suicide then they should also possess the right to receive assistance in doing so. As used in this Note, the term *assisted suicide* refers to this general concept: assisted suicide is the right of each individual to receive professional assistance in dying by suicide in the most humane way possible.

Since this Note argues that individuals have a right to die—and therefore a right to die by assisted suicide—only the individual should have this control. As discussed above, this Note does not seek to speculate on limitations that should be imposed on the right to assisted suicide. One should not impose their own morality upon those who wish to die by suicide. It should only be the individual themselves who decides when death should come from assisted suicide.

Furthermore, since the decision to die by suicide is the individual's choice, it should be the individual who decides what amount of suffering justifies suicide. Some want to limit this right to only those who are terminally ill.³² However, we should not speculate

³⁰ See *Griswold*, 381 U.S. at 485–86 (“[F]orbid[ding] the use of contraceptives . . . is repulsive to the notions of privacy surrounding the marriage relationship.”).

³¹ *Id.* at 485.

³² See *Frequently Asked Questions*, DEATH WITH DIGNITY, <https://deathwithdignity.org/resources/faqs/> (last visited May 20, 2022) (arguing that

on the amount of suffering any other individual is enduring. Some people have higher pain tolerances, different philosophical views towards death, and each person has differing levels of attachment to life. Thus, *suffering* in this Note refers generally to pain, discomfort, loss of dignity, and other sentiments that might cause an individual to desire death. At its core, the term *suffering* refers to any negative qualities that ultimately make an individual decide that death would be a better alternative.

In addition to not mandating a level of suffering, this Note also does not seek to speculate how assisted suicide should operate. Some would argue that assisted suicide should only be performed with the aid of a licensed physician who writes individuals a lethal prescription.³³ Conversely, this Note argues that individuals should have the right to receive assistance in any form from any professional.

It is not inconceivable that other professionals could provide the same prescriptions; for instance, a licensed psychiatrist or a social worker could be similarly trained to provide a lethal prescription.³⁴ It also seems plausible that other methods of dying could provide a

terminally ill patients should be able to “voluntarily and legally request and receive a prescription medication from their physician to hasten their death in a peaceful, humane, and dignified manner.”); *see generally* The Patient Choice and Control at the End of Life Act, 18 VT. STAT. ANN. BIRTHS, MARRIAGES, AND DEATHS §§ 5281, 5283 (2018); End of Life Option Act, CAL. HEALTH & SAFETY CODE §§ 443.1–443.2 (2016); Washington Death with Dignity Act, WASH. REV. CODE § 70.245.020 (2008); Oregon Death With Dignity Act, OR. REV. STAT. § 127.800 (1995).

³³ See Yvette Brazier, *What Are Euthanasia and Assisted Suicide?*, MED. NEWS TODAY (Dec. 17, 2018), <https://www.medicalnewstoday.com/articles/182951> (defining assisted suicide specifically as the practice of a doctor assisting a patient in dying by suicide); David Levine, ‘*Death with Dignity*’ or ‘*Assisted Suicide*’?, GOVERNING (Dec. 18, 2013), <https://www.governing.com/archive/gov-death-with-dignity-rhetoric.html> (stating that both death with dignity and assisted suicide refer to the practice of doctors aiding a patient in dying).

³⁴ In addition to other professionals being capable of offering the same service, it is also worth noting that using other professionals can help alleviate medical ethics concerns. *See Physician-Assisted Suicide*, AM. MED. ASS’N, <https://www.ama-assn.org/delivering-care/ethics/physician-assisted-suicide> (last visited May 20, 2022) (“Physician-assisted suicide is fundamentally incompatible with the physician’s role as healer . . .”); Joseph G. Barsness et al., *US Medical and Surgical Society Position Statements on Physician-Assisted Suicide and Euthanasia: A Review*, 21 BMC MED. ETHICS 4 (2020) (reporting that at least five medical societies officially oppose assisted suicide with the justification that assisted suicide is contrary to a physician’s role).

patient with a painless, efficient death.³⁵ This Note argues that individuals, if they have the right to die by suicide, also have the right to seek the professional guidance to die peacefully.

In contrast, parts of this Note will refer to the term *medical aid in dying* (MAID). MAID proponents assert that terminally ill individuals who die by lethal prescription are not dying by suicide; rather, these individuals are simply choosing the manner of their death.³⁶ Where the term MAID is used, it will be referring to when a terminally ill individual, likely to die within months, receives assistance from a physician to die by suicide. Certain arguments in this Note are narrower than the general right to assisted suicide and rely on the situation of the terminally ill. Therefore, where MAID is used instead of assisted suicide, it is a narrowly tailored argument referring specifically to the terminally ill. Similarly, where suffering is used in conjunction with the term MAID, that suffering will refer to the pain and anguish experienced by the terminally ill.

Though this Note argues for a broad right to receive assistance in dying by suicide, as discussed in the limitations section, no right is absolute.³⁷ The limitations section is meant to showcase possible limitations on assisted suicide if the right were granted fundamental status. That section is not meant to argue for specific limitations. Rather, the limitations section is meant to show that although this Note argues for a general right to assisted suicide, given the legal history of

³⁵ See Joachim Frost, *Death by Self-Inflicted Asphyxia With Helium—First Case Reports from Norway and Review of the Literature*, 19 SCANDINAVIAN J. FORENSIC SCI. 52, 53 (2013), <https://stolav.no/Laboratoriemedisin/Avdeling%20for%20klinisk%20farmakologi/AKF%20Publ%20Death%20by%20self-inflicted%20asphyxia%20with%20helium%20nFrost%20J,%20Scand%20J%20For%20ensic%20Sci.pdf> (reporting that helium asphyxia is an alternative to prescription medications in helping one die and presents an opportunity where a medical professional is not necessary).

³⁶ *Medical Aid in Dying is Not Assisted Suicide, Suicide or Euthanasia*, COMPASSION & CHOICES, <https://compassionandchoices.org/about-us/medical-aid-dying-not-assisted-suicide/> (last visited May 20, 2022). However, in cases of MAID and suicide the individual is deciding to end their life by their own means. Removing the terminally ill from suicide's definition is an arbitrary distinction since everyone is destined to die, whether that is 6 months from now or 40 years, and deciding to end one's life at a specified moment is suicide. See *Facts About Suicide*, CDC, <https://www.cdc.gov/suicide/facts/index.html> (last visited May 20, 2022) (defining suicide as "death caused by injuring oneself with the intent to die").

³⁷ *Infra* Part I.D.

fundamental rights that right to assisted suicide would likely be limited.

Additionally, although this Note argues that any individual maintains the right to die by suicide and therefore the right to receive assistance in doing so, this Note is not meant to promote suicide in general. Although every citizen should have the right to determine the day of their death, that does not mean that death is always the best option. People may argue for a right to marriage, for example, but they might not think marriage is appropriate in every situation. For instance, marriage may be everyone's right to pursue, but marriage might not be the best choice with a partner who is physically and psychologically abusive. Similarly, this Note argues that everyone has the right to die by suicide, but that does not mean that everyone should die by suicide. There are situations where suicide may be justified and there are situations where it probably is not; however, determining in each case whether suicide is justified does not change the argument that the determination should be the individual's.

In general, this Note argues that individuals have a right to die by suicide. Following this logic, if one may die by suicide, they should be able to receive professional assistance in doing so. *Assisted suicide*, as used in this Note, will encompass the terms MAID, physician-assisted suicide, passive euthanasia, self-administered euthanasia, or any other term that entails an individual dying by suicide using professional assistance. If an individual has decided that death would be preferable to continuing a life of suffering, then that individual should have the right to die.

C. The Glucksberg Analysis

The case of concern in this Note is *Glucksberg*, which established that assisted suicide is not a fundamental right.³⁸ *Glucksberg* used the historic test to analyze assisted suicide.³⁹ The Court reasoned that there is a long history of the state prohibiting suicide and assistance thereof⁴⁰ and therefore declared that the right to

³⁸ *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997).

³⁹ *Id.*

⁴⁰ *Id.*

assisted suicide is not fundamental. In their analysis, the Justices added that there must be a “‘careful description’ of the asserted fundamental liberty interest.”⁴¹

Carefully asserting a right requires one to clearly formulate the specific asserted right.⁴² Using this requirement, the Court viewed assisted suicide as the “right to commit suicide which itself includes a right to assistance in doing so.”⁴³ Further, the Justices limited their analysis to only the historical practice of receiving assistance in suicide.⁴⁴ By analyzing the right through such a narrow lens, assisted suicide was denied fundamental status.⁴⁵

To broaden the analysis, the respondents in *Glucksberg* tried to assert rights other than the specific right to assisted suicide.⁴⁶ The respondents asserted that the right in question was actually the right to die or the right to control one’s final days.⁴⁷ Nevertheless, the Court reasoned that those rights were not carefully asserted, and the opinion considered only the specific act of assisted suicide.⁴⁸ The respondents were not allowed to assert that another right could encompass assisted suicide.⁴⁹

Also, the Court refused to consider any justification other than the historical practice of assisted suicide.⁵⁰ No other historical traditions were analyzed; only assisted suicide’s history came into consideration.⁵¹ The Justices refused to consider the patient’s rights to privacy and autonomy as justifications for assisted suicide.⁵² Similarly, there was no consideration of how America’s conscience demands assisted suicide be ranked fundamental.⁵³ In this case, the Court limited its analysis to only the specific history of assisted suicide.

⁴¹ *Id.* at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

⁴² *See id.* (requiring a careful assertion of rights to limit expansion of substantive due process claims).

⁴³ *Id.* at 723.

⁴⁴ *Id.*

⁴⁵ *Id.* at 728.

⁴⁶ *Id.* at 722.

⁴⁷ *Id.*

⁴⁸ *Id.* at 723.

⁴⁹ *Id.*

⁵⁰ *Id.* at 728.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

Asserted rights are rarely viewed as narrowly as the *Glucksberg* decision viewed assisted suicide. *Glucksberg* cites the carefully asserted rule as justification to examine asserted rights from such a restrictive point of view.⁵⁴ The cases cited to for the carefully asserted rule were *Reno v. Flores*, *Collins v. City Harker Heights*, and *Cruzan v. Missouri Department of Health*.⁵⁵ These cases can be distinguished from the *Glucksberg* analysis.

In *Flores*, the Justices had to decide whether a non-citizen juvenile has the right to be free from physical restraint.⁵⁶ The issue concerned whether a non-resident child, who lacks an approved custodian, had a right to be given to another responsible adult in lieu of government care.⁵⁷ Even though the case actually concerned an immigrant, the right was viewed more broadly as the right for any child.⁵⁸ The analysis broadened the right asserted, which concerned immigrant children, and evaluated whether any child should have the asserted right.⁵⁹ Although this case required a careful assertion of rights, the Court viewed the right from a broader perspective.

Additionally, the *Collins* decision also used the carefully asserted requirement.⁶⁰ This case concerned the rights of a man killed on a government jobsite.⁶¹ In this case, the widow sued claiming the government violated her husband's right to a safe work environment.⁶² Only the right to a safe work environment was asserted, but the Court evaluated this right as including protection from arbitrary government action.⁶³ The analysis looked to see if deliberate indifference to a

⁵⁴ *Id.* at 721.

⁵⁵ *Id.*

⁵⁶ *Reno v. Flores*, 507 U.S. 292, 299–300 (1993) (stating respondent's arguments that support their claim that juvenile aliens have a fundamental right to freedom of physical restraint).

⁵⁷ *Id.* at 300.

⁵⁸ *Id.* at 302 (describing generally the rights of a child and guardian, rather than immigrant children specifically).

⁵⁹ *Id.*

⁶⁰ *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992).

⁶¹ *Id.* at 117.

⁶² *Id.* at 125–26.

⁶³ *See id.* at 126–29 (analyzing whether the asserted right could be justified through the duty to provide a safe work environment, whether there is a right to be protected against incorrect or ill-advised personnel decisions, and whether there was a duty to properly train government employees to protect health and safety) (citing *Bishop v. Wood*, 426 U.S. 341, 350 (1976)).

worker's safety constituted arbitrary government action.⁶⁴ Including arbitrary government action created another avenue to justify the asserted right. Despite requiring that the right be carefully asserted, the opinion explored multiple considerations to justify the right.

Furthermore, *Cruzan* also employed the carefully asserted rule. *Cruzan* determined the right to remove life-sustaining equipment was fundamental.⁶⁵ The petitioners asserted a guardian's right to remove life-sustaining equipment from an unconscious patient.⁶⁶ The analysis evaluated whether any patient, conscious or otherwise, had the right to remove life-sustaining equipment.⁶⁷ This right was also compared to the rights to informed consent, to abstain from eating and drinking, and to refuse medical aid.⁶⁸ This abstraction helped establish the fundamental right to remove life-sustaining equipment.⁶⁹

Cases that employ the carefully asserted requirement generally provide more flexibility in fundamental rights analysis than the *Glucksberg* decision. Carefully asserted cases usually take the asserted right and abstract the right further in order to analyze said right. These cases look to various justifications for an asserted right as well. Nevertheless, the Court claimed that the right asserted in *Glucksberg* was only the right to assisted suicide and looked only to the specific historical practice of this right for justification. This extremely narrow view led to the wrongful determination that assisted suicide is not a fundamental right.

As shown above, the carefully asserted requirement is rarely viewed as narrowly as it was in *Glucksberg*. The *Glucksberg* decision reflects moral objections to assisted suicide; the Justices took an extremely narrow approach to fundamental rights to ensure that assisted suicide was not declared fundamental. The *Glucksberg* decision viewed fundamental rights much more narrowly than the majority of fundamental rights cases. Justices should not be able to

⁶⁴ *Id.* at 126 (citing *Rochin v. California*, 342 U.S. 165, 172 (1952)).

⁶⁵ *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 268 (1990).

⁶⁶ *Id.* at 267–68.

⁶⁷ *See id.* at 278–84 (examining whether the right for a competent person to abstain from life-sustaining equipment is a protected liberty interest under the Due Process Clause, then after declaring this right to be a protected interest, the Court addressed the issue regarding guardians and the power of attorney in these situations).

⁶⁸ *See id.* at 274–78.

⁶⁹ *Id.* at 278.

explore fundamental rights so narrowly because this approach makes it difficult to recognize new rights.

D. Possible Limitations on the Right to Assisted Suicide

Recognizing assisted suicide as a fundamental right would not allow anyone to access this right. No right is absolute; all rights are subject to some restraint.⁷⁰ There likely would be certain limitations placed on assisted suicide if granted fundamental status. Laws may limit fundamental rights if they pass strict scrutiny⁷¹ or the undue burden test.⁷²

Under the strict scrutiny standard, laws must be narrowly tailored to serve a compelling state interest.⁷³ This means laws limiting fundamental rights must address a legitimate state concern—a concern so strong that it justifies limiting a fundamental right.⁷⁴ In addition, the law must specifically address the state concern of issue.⁷⁵

If assisted suicide were granted fundamental status, laws could limit assisted suicide if they pass strict scrutiny. States with MAID statutes frequently limit the practice to terminally ill patients, often defining being terminally ill as having “an incurable and irreversible disease which would, within reasonable medical judgment, result in death in six months.”⁷⁶ States could also limit assisted suicide to only physician-assisted suicide, where a licensed physician prescribes a lethal dose of medication.⁷⁷ Both of these options are for a compelling state interest—protecting healthy citizens. Furthermore, these restrictions appear to be narrowly tailored for that interest without

⁷⁰ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 875 (1992) (explaining that a right to have an abortion is not free from states’ interference).

⁷¹ See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014) (applying the least-restrictive-means standard of strict scrutiny to prove that the law does not pass the test).

⁷² *Casey*, 505 U.S. at 876.

⁷³ *Burwell*, 573 U.S. at 728.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ 18 VT. STAT. ANN. §§ 5281, 5283 (2018); accord CAL. HEALTH & SAFETY CODE §§ 443.1–443.2 (West 2022); WASH. REV. CODE §§ 70.245.010.13, 70.245.20 (2008); OR. REV. STAT. § 127.800 (1995).

⁷⁷ *Statement on Physician-Assisted Dying*, AM. ACAD. HOSPICE & PALLIATIVE MED. (June 24, 2016), <http://aahpm.org/positions/pad>.

broadly prohibiting assisted suicide. Limiting assisted suicide to the terminally ill and requiring a physician's prescription are two limitations that would likely pass strict scrutiny.

Another possibility to limit assisted suicide would be adopting the undue burden test. The right to abortion is not subjected to strict scrutiny, rather abortion laws must pass the undue burden test.⁷⁸ This means laws restricting access to an abortion may not erect substantial obstacles in the way of women desiring an abortion.⁷⁹ Similarly, laws that restrict assisted suicide could be subjected to the undue burden standard. Waiting until a patient is terminally ill, as defined above, likely would not place an undue burden on patients. Likewise, requiring physicians to prescribe proper medication would likely not be an undue burden. Whether subjected to strict scrutiny or the undue burden test, various laws could restrict assisted suicide if recognized as a fundamental right.

In addition to laws that restrict assisted suicide, private actors may also limit access to this right. Medical professionals often are not forced to perform procedures they are not comfortable with.⁸⁰ This means that individuals would not be forced to write suicide prescriptions. In like manner, organizations may refuse to offer medical insurance to for their employees that the organization morally objects to.⁸¹ Organizations who morally oppose assisted suicide would not be required to provide insurance coverage for suicide prescriptions.

Granting assisted suicide as a fundamental right would not require action from anyone who is opposed to the procedure. Only consenting individuals will participate in facilitating assisted suicide. Professionals would not be forced to prescribe lethal medications, nor would organizations be forced to provide employees with access to

⁷⁸ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876 (1992).

⁷⁹ *Id.* at 877.

⁸⁰ See *Abortion Refusal Laws*, NARAL PRO-CHOICE AM., <https://www.prochoiceamerica.org/issue/abortion-refusal-laws/> (last visited May 20, 2022) (reporting that most states permit doctors to abstain from giving abortions, and states allow pharmacists to abstain from providing birth control); June M. McKoy, *Obligation to Provide Services: A Physician-Public Defender Comparison*, 8 ETHICS J. AM. MED. ASS'N 332, 334 (2006) (explaining that generally doctors have the right to choose who they will treat, except for in times of emergency).

⁸¹ See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736 (2014) (declaring that organizations with religious objections have no legal duty to provide insurance that covers contraceptives).

assisted suicide. Further, only consenting patients will receive a suicide prescription. Recognizing the right to assisted suicide will only affect citizens who are not opposed to the procedure. The right to assisted suicide would offer patients the autonomy to decide the day of their death. At the same time, this right would not place other citizens' moral virtues in jeopardy.

Additionally, assisted suicide does not place the same burden on doctors as voluntary euthanasia. Voluntary euthanasia is when a doctor, by patient request, ends the patient's life through painless means.⁸² On the other hand, assisted suicide is when a professional helps a patient die by suicide.⁸³ Assisted suicide is limited only to patients who can administer death by themselves.⁸⁴

Self-administration of suicide prescriptions ensures the patient remains in control of their death. This provides the patient control over their life, without requiring others to take a life. With assisted suicide, professionals can help provide patients a painless method to end the patient's suffering. These professionals are helping their patients receive the intervention the patient desires, but they are not forced to kill. Assisted suicide, as opposed to euthanasia, respects the autonomy of both the patients and the one providing aid. This limitation ensures that professionals are in a position to help their patients, without requiring people to kill.

Assisted suicide should be a fundamental right, but that does not mean it should be a right without limitation. States would have the power to write laws that restrict access to assisted suicide. As long as these laws pass strict scrutiny or the undue burden standard, then legislation could limit assisted suicide. Moreover, various private actors could restrict access to this procedure. Lastly, patients would have to take their own life without relying on others to make death possible.

⁸² Brazier, *supra* note 33.

⁸³ *Id.*

⁸⁴ AM. ACAD. HOSPICE & PALLIATIVE MED., *supra* note 77.

II. ARGUMENT

A. *The Broad Historic Test and Assisted Suicide*

First, this Note will address the historical right to assisted suicide. *Glucksberg* viewed assisted suicide through a very narrow historic lens. Conversely, this Note will evaluate the right to assisted suicide from a broader historical view. This Note will discuss the historical right to hasten one's death and the right to risk one's life to end suffering.

1. The Right to Hasten One's Death

There are many traditions that validate the claim that the United States recognizes the right to hasten one's death. From permitting smoking to allowing removal of life-sustaining equipment, the United States has long recognized the personal liberty to hasten death. However, the Supreme Court has wrongly excluded assisted suicide from this list of liberties.

To begin, the United States currently permits people to engage in several activities that cause premature deaths. Obesity causes several of the most common conditions which lead to preventable deaths.⁸⁵ Cigarettes cause almost half a million deaths per year.⁸⁶ Moreover, many people die from alcohol consumption, totaling almost one hundred thousand deaths per year.⁸⁷ The list of undertakings mentioned above is not exhaustive; plenty of lawful activities may result in death.⁸⁸

⁸⁵ *Adult Obesity Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/obesity/data/adult.html> (last visited May 2, 2022).

⁸⁶ *Smoking and Tobacco Use*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/index.htm (last visited Apr. 18, 2022).

⁸⁷ *See Deaths from Excessive Alcohol Use in the U.S.*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/alcohol/features/excessive-alcohol-deaths.html> (Jan. 14, 2021) (reporting over 95,000 alcohol-related deaths per year in the U.S.).

⁸⁸ *See generally 2019 Fatality Data Show a Continued Annual Decline in Traffic Deaths*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. (Oct. 1, 2020), <https://www.nhtsa.gov/press-releases/2019-fatality-data-traffic-deaths-2020-q2-projections#:~:text=The%20FARS%20data%20indicate%20that,the%20same%20p>

Similarly, patients in the United States have the right to abstain from any life-saving medical procedures.⁸⁹ There is also a fundamental protected liberty interest to die by removing life-sustaining medical equipment.⁹⁰ In addition, the Supreme Court has reasoned that there is a right to abstain from eating or drinking—both of which lead to certain death.⁹¹ Patients have the right to refuse life-saving treatments if the patient wishes to die.⁹²

At the same time, the above examples can be temporally distinguished from the right to assisted suicide. For instance, it may take less than an hour to die from an assisted suicide prescription.⁹³ On the other hand, dying from the removal of life-sustaining equipment can last up to 21 days.⁹⁴ That said, the temporal differences do not warrant treating assisted suicide as distinct from other traditions of hastening one's death.

Even though assisted suicide is much quicker than other ways to die, that does not justify depriving patients their right to assisted suicide. No one wants to prolong their suffering, and assisted suicide provides patients a quick, painless death. More importantly, assisted suicide is also distinguishable given the fact it does not cause

eriod%20in%202019 (reporting over 36,000 deaths from motor vehicle accidents in 2019); *Immunization*, WORLD HEALTH ORG. (Dec. 5, 2019), <https://www.who.int/news-room/facts-in-pictures/detail/immunization> (showcasing how millions of deaths could be prevented by global vaccinations); see, e.g., Amanda Greer, *Extreme Sports and Extreme Liability: The Effect of Waivers of Liability in Extreme Sports*, 9 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 81, 84 (2012) (discussing the inherent dangers of extreme sports and how some sports may even cause death).

⁸⁹ *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 270 (1990).

⁹⁰ *Id.* at 279–80.

⁹¹ *Id.* at 279.

⁹² See generally *id.* at 278 (recognizing that competent people have “a constitutionally protected liberty interested in refusing unwanted medical treatment”).

⁹³ See Jennie Dear, *The Doctors Who Invented a New Way to Help People Die*, ATLANTIC (Jan. 22, 2019), <https://www.theatlantic.com/health/archive/2019/01/medical-aid-in-dying-medications/580591/> (reporting that the median time until death after ingestion of a suicide prescription is 25 minutes).

⁹⁴ See *Questions and Answers About “Artificial Feeding,”* PATIENTS RTS. COUNCIL, <http://www.patientsrightscouncil.org/site/artificial-feeding/#:~:text=They'll%20simply%20feel%20thirst,from%20dehydration%2C%20not%20starvation> (last visited May 21, 2022) (noting that death after removal of food may take anywhere from five to 21 days).

suffering.⁹⁵ Removal of life-sustaining equipment may place the patient in a state of duress, suffering unknowable pain.⁹⁶ Likewise, smoking and alcohol consumption can lead to years of suffering.⁹⁷ Admittedly, assisted suicide leads to a much quicker death than other methods of hastening death, but assisted suicide does not introduce additional suffering. Assisted suicide is a personal decision that allows patients to painlessly put an end to their suffering.

There is nothing more personal than one's death,⁹⁸ and suffering patients should have the option to hasten death through assisted suicide. Admittedly, the United States has not historically recognized the specific act of assisted suicide. However, prior to *Loving*, interracial marriage was not commonly practiced, but the Court derived the right to interracial marriage from the general history of marriage in the United States.⁹⁹ Similarly, one can derive the right to assisted suicide from the right to hasten one's death.

Individuals have the right to hasten their death through various means; nonetheless, *Glucksberg* failed to recognize assisted suicide as embedded in this tradition. Distinguishing assisted suicide from other ways to hasten death ignores the history of personal autonomy. Citizens are permitted to develop unhealthy addictions, drive cars, and play potentially deadly sports. Citizens have the freedom to engage in many deadly activities, but patients who have consented to die are denied this freedom. The United States has long recognized that citizens have the freedom to control their own life and body. It is time

⁹⁵ Dear, *supra* note 93.

⁹⁶ See PATIENTS RTS. COUNCIL, *Questions and Answers About "Artificial Feeding,"* *supra* note 94 (reporting that most patients removed from feeding tubes are given painkillers, however medication often is not enough to stop the pain).

⁹⁷ See CTRS. FOR DISEASE CONTROL & PREVENTION, *Smoking and Tobacco Use*, *supra* note 86; CTRS. FOR DISEASE CONTROL & PREVENTION, *Deaths from Excessive Alcohol Use in the U.S.*, *supra* note 87.

⁹⁸ See MARTIN HEIDEGGER, *BEING AND TIME* 308 (John Macquarrie & Edward Robinson trans., 2013) ("Death does not just 'belong' to one's own [existence] in an undifferentiated way; death *lays claim* to it as an *individual* [existence]. The non-relational character of death, as understood in anticipation, individualizes [existence] down to itself."); see also SIGMUND FREUD, *BEYOND THE PLEASURE PRINCIPLE* 32–33 (Mary Waldrep & Jim Miller eds., 2015) ("[W]e shall be compelled to say that '*the aim of all life is death*' What we are left with is the fact that the organism wishes to die only in its own fashion.").

⁹⁹ See *supra* notes 11–17.

the Court acknowledges this freedom by overturning *Glucksberg* and declaring assisted suicide a fundamental right.

2. The Right To Risk One's Life To Alleviate Suffering

Patients are often given the autonomy to risk their lives to alleviate suffering. There are many medical procedures that may lead to a premature death. Nevertheless, patients forego this risk in situations that require drastic relief. Similarly, assisted suicide is another opportunity for patients to risk their lives pursuing an existence free of suffering.

One method available to relieve a patient's suffering is surgical intervention. Surgery is a long-recognized medical practice in the United States, despite some surgeries presenting great risks of death.¹⁰⁰ In addition to risky operations, all operations inherently present some risks.¹⁰¹ What is more, medical malpractice kills an alarming number of citizens each year.¹⁰² Patients are given the autonomy to receive surgical intervention even if that surgery could lead to the patient's death.

In addition to surgeries, patients may risk their lives receiving other forms of medical assistance. Patients who have cancer may receive chemotherapy to hopefully relieve their suffering.¹⁰³ That said, there is a chance that chemotherapy could kill the patient.¹⁰⁴ Patients may partake in experimental trials of new medications.¹⁰⁵ Some of

¹⁰⁰ See *According to Experts, These Are the 7 Deadliest Surgeries*, BRADY, BRADY & REILLY, LLC (Apr. 2, 2020), <https://bbr-law.com/according-to-experts-these-are-the-7-deadliest-surgeries/> (describing surgeries related to shock, internal bleeding, infections, adhesion, and intestinal obstruction as being abnormally dangerous).

¹⁰¹ *Id.*

¹⁰² See *id.* (chronicling how medical malpractice may be the third leading cause of death in the United States).

¹⁰³ Ralph W. Moss, *When Chemo Kills: The Inside Story*, MOSS REPS. (Feb. 26, 2019), <https://www.mossreports.com/when-chemo-kills/#:~:text=%E2%80%9CPatients%20with%20cancer%20who%20die,result%20of%20the%20chemo%20itself.>

¹⁰⁴ *Id.*

¹⁰⁵ Ted Gup & Jonathan Neumann, *Experimental Drugs: Death in the Search for Cures*, WASH. POST (Oct. 18, 1981), <https://www.washingtonpost.com/archive/1981/10/18/experimental-drugs-death-in-the-search-for-cures/c85ad468-c91e-4cbc-b02b-6743f00bbbd0/>.

these experimental medications have led to premature deaths.¹⁰⁶ Patients are given the autonomy to risk their life to relieve their suffering, and patients who want assisted suicide should have this freedom as well.

One might argue that the intents of the patients above differ from patients who desire assisted suicide. Patients who are seeking assisted suicide are intending to die, while other patients risking their lives are intending to live. However, one cannot assume that the intent is only to die in the case of assisted suicide. Patients seeking assisted suicide are intending to alleviate suffering through the act of dying. Similarly, patients in other procedures are intending to alleviate suffering through the procedure. In both situations, the patients are intending to alleviate suffering; the only difference is the respective means employed by the patients.

If one considers assisted suicide as a way to end suffering—rather than a desire to die—patients should not be denied this practice. Patients seeking assisted suicide do not necessarily wish to die, but they have determined that ending their suffering outweighs the risk of death.¹⁰⁷ In similar fashion, patients undergoing other surgeries have determined that the potential benefits outweigh the involved risks. Although the risk of death may be higher in some medical procedures, almost all procedures involve patients betting their lives on the outcome.

Nevertheless, patients who request assisted suicide are not given the option to risk their life. These patients deserve the liberty to risk their life to end suffering just like any other patient. If a higher risk of death can justify distinguishing assisted suicide from other procedures, then one must discern a maximum level of risk patients may consent to. However, when one's life is at risk, only the individual

¹⁰⁶ *Id.* (showcasing how the Washington Post documented 620 deaths of cancer patients from experimental drugs in a single year); see also Marilyn Marchione, *More Deaths, No Benefit from Malaria Drug in VA Virus Study*, AP NEWS (Apr. 21, 2020), <https://apnews.com/article/a5077c7227b8eb8b0dc23423c0bbe2b2> (reporting that COVID-19 related deaths increased when patients were administered the experimental drug hydroxychloroquine).

¹⁰⁷ Naomi Richards, *Assisted Suicide as a Remedy for Suffering? The End-of-Life Preferences of British "Suicide Tourists,"* 36 MED. ANTHROPOLOGY 348, 355–56 (2017) (reporting that a woman chose assisted suicide to end her suffering related to a disease that had no cure and no safe method existed to alleviate her pain).

should be in the position to consent to risks. Assisted suicide causes a guaranteed death, but that risk is the patient's responsibility to bear.

Additionally, where other patients are endangering their life, patients who consent to assisted suicide have determined death to be their best option. If life is so valuable that suffering patients cannot end their life painlessly, should we permit patients to stake their life on the success of medicine? Patients who want assisted suicide have placed a value on their life, and they have determined that death would be better than suffering indefinitely. Patients can gamble their life on other procedures, and these procedures do not guarantee success. On the other hand, terminally ill patients may not consent to a peaceful, guaranteed release from their pain. If a patient desires assisted suicide, they should not be denied the freedom of a dignified death.

Some individuals may think that no amount of suffering could justify the decision to die by suicide. There are many factors that contribute to whether an individual would justify suicide including religious, ethical, and psychological beliefs.¹⁰⁸ The justification of suicide is an extremely private decision that is best left to the individual. Patients should have the liberty to combat their suffering without the government dictating the amount of risk citizens are permitted to take.

These different opinions on how to alleviate suffering should not be within the scope of the Supreme Court to decide. The Court usually tries to avoid imposing its views of morality and philosophy because these subjects are best left to other professionals.¹⁰⁹ According to Albert Camus, "there is but one truly serious philosophical problem, and that is suicide. Judging whether life is or is not worth living amounts to answering the fundamental question of philosophy."¹¹⁰

¹⁰⁸ *Resolution on Assisted Dying and Justification*, AM. PSYCH. ASS'N (Aug. 2017), <https://www.apa.org/about/policy/assisted-dying-resolution>.

¹⁰⁹ *See Roe v. Wade*, 410 U.S. 113, 159 (1973) ("When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.").

¹¹⁰ ALBERT CAMUS, *THE MYTH OF SISYPHUS* 3 (Justin O'Brien trans., 2d ed. 1955). *Cf.* ARTHUR SCHOPENHAUER, *On Suicide*, in *SUFFERING, SUICIDE AND IMMORTALITY* 31 (T. Bailey Saunders trans., 2006) (1890) ("Suicide may also be regarded as an experiment—a question which man puts to Nature, trying to force her to an answer. The question is this: What change will death produce in a man's existence and in his insight into the nature of things.").

There are deep philosophical and religious implications that may arise from dictating what means a person may take to alleviate suffering.

Even though there is no tradition of assisted suicide in the United States, there is a history of permitting patients to make decisions regarding their state of suffering. *Glucksberg* failed to consider that assisted suicide was another method available to alleviate a patient's suffering. If one uses the broad historic test, then assisted suicide should be justified through the historic tradition of patient autonomy. Generally, patients have the right to choose how they will combat their suffering, and patients should have the autonomy to choose assisted suicide.

Even if the Court morally disagrees with assisted suicide, that does not justify denying patients their autonomy. The Court should not resolve medical decisions. America has long recognized that any person "of adult years and sound mind has a right to determine what shall be done with his own body."¹¹¹ There is a tradition in the United States of giving patients the autonomy to make medical decisions. If a patient makes a conscious decision to end their life, then they should have the autonomy to do so.

B. The Changing Conscience Test and Assisted Suicide

Society's conscience also demands that assisted suicide receive fundamental status. This Part will first showcase the high number of citizens that approve of patients having the right to assisted suicide. Then this section explores why assisted suicide used to be prohibited. Lastly, this section will argue that reasons for prohibition are no longer justified in this current society.

1. The Conscience of America Demands Assisted Suicide Be Ranked a Fundamental Right

Advancements in medicine are allowing people to live longer lives than ever before.¹¹² Even so, as many patients know too well,

¹¹¹ *Schloendorff v. Soc'y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914).

¹¹² Mike Stobbe, *For 1st Time in 4 Years, US Life Expectancy Rises – A Little*, AP NEWS (Jan. 30, 2020), <https://apnews.com/article/health-death-rates-robert-anderson-new-york-cancer-72a0edc70c1797d9570674362445574f>.

advancements in medicine may also keep patients alive longer than desired. Some patients endure tremendous pain before death, and the thought of medicine prolonging this suffering would be a nightmare to countless patients. As society realizes the suffering some patients endure, many Americans are acknowledging that individuals should have the right to terminate their life. Moreover, various jurisdictions have also begun recognizing that their citizens should be given the right to assisted suicide.

The Supreme Court has not recognized assisted suicide as a fundamental right federally, but various jurisdictions within the United States have begun permitting MAID.¹¹³ There are currently eight states in the United States who permit MAID by statute.¹¹⁴ Additionally, the Montana Supreme Court legalized MAID in the case *Baxter v. Montana*.¹¹⁵ Furthermore, Washington D.C. also permits MAID.¹¹⁶

In addition to jurisdictions that permit MAID, one can see a growing acceptance of MAID in the American conscience. Polls show that up to 74% of Americans agree that terminally ill patients should have the legal right to MAID.¹¹⁷ Furthermore, polls show that this majority support of MAID is present across many demographics.¹¹⁸ Additionally, almost 60% of American physicians believe that MAID should be legal.¹¹⁹ From laymen to professionals, across religious and political spectrums, citizens throughout America strongly support the right to MAID.¹²⁰ The United States citizenry has become increasingly

¹¹³ *State Statute Navigator*, DEATH WITH DIGNITY, <https://deathwithdignity.org/resources/state-statute-navigator/> (last visited Apr. 23, 2022).

¹¹⁴ The states that have Death with Dignity Acts include California, Colorado, Hawaii, Maine, New Jersey, Oregon, Vermont, and Washington. California, Colorado, and Hawaii have MAID statutes, while Maine, New Jersey, Oregon, Vermont, and Washington have self-administer or similar statutes. *Id.*

¹¹⁵ See *Baxter v. Montana*, 224 P.3d 1211, 1222 (Mont. 2009) (finding that assisted suicide is not prohibited by either Montana Supreme Court precedent nor state statute).

¹¹⁶ DEATH WITH DIGNITY, *State Statute Navigator*, *supra* note 113.

¹¹⁷ Compassion & Choices, *Polling on Medical Aid in Dying* (Mar. 15, 2022), <https://compassionandchoices.org/resource/polling-medical-aid-dying/>.

¹¹⁸ See *id.* (reporting that various religions, races, and political parties all show majority support for assisted suicide).

¹¹⁹ *Id.*

¹²⁰ *Id.*

supportive of terminally ill patients having the right to MAID.¹²¹ When a patient is suffering unknowable pain, for an indeterminate sentence, death may be one's only salvation.¹²² Many Americans now realize the choice to end suffering through MAID should be the patient's right, free from government prohibition. The American conscience has evolved and now recognizes that patient's should have the right to MAID.

As discussed in *Obergefell*, fundamental rights should be created to keep in sync with the public conscience.¹²³ If the majority of Americans admit that patients should have the right to MAID, then this right should be declared fundamental. The *Glucksberg* decision ignored the conscience of the populace, instead looking only to history to justify assisted suicide. However, when one actually considers the perception of MAID among the populace, it is clear that MAID should be ranked fundamental.

America has grown more accepting of MAID, and the Court should recognize that terminally ill patients deserve the right to MAID. Society is not stagnant, and failure to realize this fact leads to citizens being deprived of fundamental rights. Suicide has long been prohibited, but that does not mean prohibitions should remain forever. When society progresses, so does the American conscience, and with that comes the recognition of new rights. The Court should have a duty to respect the values of America by creating fundamental rights that align with the public conscience. When most Americans respect the autonomy of patients to choose MAID, the Court should grant MAID fundamental status.

¹²¹ *Id.*

¹²² "It will generally be found that, as soon as the terrors of life reach the point at which they outweigh the terrors of death, a man will put an end to his life. . . . It is this feeling that makes suicide easy; for the bodily pain that accompanies [suicide] loses all significance in the eyes of one who is tortured by an excess of mental suffering." SCHOPENHAUER, *supra* note 110, at 30.

¹²³ *See supra* notes 18–21.

2. Reasons Previously Advanced in Opposition to Assisted Suicide No Longer Hold Weight

In addition to looking at America's changing conscience, *Roe v. Wade* also asked: Why was the asserted right previously prohibited?¹²⁴ The Court claimed that abortion was illegal because of Victorian prohibitions of illicit sexual conduct, and because abortions used to be very dangerous.¹²⁵ Assisted suicide has been prohibited for similar reasons, and analogous to the decision in *Roe v. Wade*, assisted suicide should be declared a fundamental right.

The Court did not take the first argument seriously, namely, the analysis viewed Victorian prohibitions as outside the realm of the law.¹²⁶ The Court does not have jurisdiction to mandate one moral or religious code.¹²⁷ When there are serious religious debates concerning assisted suicide, questions left unanswered should not be decided by the Supreme Court.¹²⁸ Religious views concerning assisted suicide differ.¹²⁹ Still, even if religions unanimously disapproved, that is not a justifiable reason for the state to prohibit assisted suicide.

Roe v. Wade also presented the argument that abortion used to be prohibited because it posed great concerns to the mother's health.¹³⁰ However, that justification for prohibition was no longer relevant

¹²⁴ *Roe v. Wade*, 410 U.S. 113, 147 (1973) (explaining three historical reasons why criminal abortion laws were justified).

¹²⁵ *Id.* at 148.

¹²⁶ *Id.*

¹²⁷ *Id.* at 159 (stating that the judiciary should not speculate on matters those medically trained have not come to a consensus on).

¹²⁸ See *Emp. Div. v. Smith*, 494 U.S. 872, 877 (1990) (citing *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 445–52 (1969)); see *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 95–120 (1952); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710, 713, 723–25 (1976) (declaring that the Free Exercise Clause prohibits the government from interfering with controversies between religious authorities).

¹²⁹ Compare Inst. of Clinical Bioethics, *Religious Perspectives on Euthanasia*, ST. JOSEPH'S U. (Mar. 14, 2011), <https://sites.sju.edu/icb/religious-perspectives-on-euthanasia/> (“Methodists generally accept the individual’s freedom of conscience to determine the means and timing of death.”), with Inst. of Clinical Bioethics, *What Is the Catholic Church’s Position on Suicide and Physician-Assisted Suicide?*, ST. JOSEPH’S U. (Mar. 4, 2016), <https://sites.sju.edu/icb/catholic-churchs-position-suicide-physician-assisted-suicide-declaration-euthanasia/> (claiming the Catholic Church views suicide and murder as equally wrong).

¹³⁰ *Roe v. Wade*, 410 U.S. 113, 148 (1973).

because abortions had become safe to perform.¹³¹ Since this justification for prohibiting abortion was no longer relevant, it was not a valid argument against abortion.¹³² Similarly, suicide used to be a painful act, but advancements in medicine have invalidated this justification for prohibiting assisted suicide.

Unfortunately, humans have created many ways to die, methods that are usually painful and not always guaranteed. Some people have used hemlock, which causes respiratory failure, coma, and eventually death, to die by suicide.¹³³ Samurai also practiced their own form of suicide called *seppuku*, which involved cutting one's abdomen with a sword.¹³⁴ Additionally, lethal injections have been described as “[a] death of organ failure, of a dramatic nature that I recognized would be associated with suffering.”¹³⁵ These few examples should suffice to provide images of dreadful methods to end one's life.

Conversely, there are some new methods of suicide that provide patients with painless deaths.¹³⁶ Two barbiturates, pentobarbital and secobarbital, have proven to be efficient prescriptions for quick, painless deaths.¹³⁷ Furthermore, doctors have created a promising mixture of sedatives, called DMP, to use as a suicide prescription.¹³⁸ DMP has proven to be an effective means to quickly and painlessly help patients die by suicide. Though some methods of suicide are very painful, medical advancements have created painless methods to aid patients in dying.

¹³¹ *Id.* at 149.

¹³² *Id.*

¹³³ Douglas Brtalik et al., *Intravenous Poison Hemlock Injection Resulting in Prolonged Respiratory Failure and Encephalopathy*, 13 J. MED. TOXICOLOGY 180, 181–82 (2017).

¹³⁴ Kallie Szczepanski, *Bushido: The Ancient Code of the Samurai Warrior*, THOUGHTCO (Sept. 5, 2019), <https://www.thoughtco.com/seppuku-definition-195157>.

¹³⁵ Noah Caldwell et al., *Gasping for Air: Autopsies Reveal Troubling Effects of Lethal Injection*, NPR (Sept. 21, 2020), <https://www.npr.org/2020/09/21/793177589/gasping-for-air-autopsies-reveal-troubling-effects-of-lethal-injection>.

¹³⁶ Dear, *supra* note 93.

¹³⁷ *But see id.* (showcasing how pentobarbital is no longer approved for human use, and the price of secobarbital has become too expensive to be used commonly).

¹³⁸ *See id.* (noting that a mixture of morphine, diazepam, and propranolol serve as the active ingredients in the medication known as DMP).

Perhaps at some point prohibitions of suicide existed because suicide presented extreme danger to citizens' health and safety. If assisted suicide was prohibited because it was too painful, this argument no longer holds weight. According to *Roe v. Wade*, "any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared."¹³⁹ Similarly, assisted suicide is no longer a slow, painful endeavor, thus alleviating a state interest in prohibiting assisted suicide.

Assisted suicide was likely prohibited in the past because the only options available to citizens were extremely painful. In contrast, medicine allows patients to survive longer than in the past.¹⁴⁰ These patients may undergo long durations of suffering, until they finally die. Modern assisted suicide provides these suffering patients a painless way to terminate their life.¹⁴¹ When abortions were no longer hazardous, and pregnancies posed similar risks, there was no longer any reason for the state to prohibit abortion.¹⁴² Similarly, assisted suicide is painless, and the only other option is for these patients to experience tremendous suffering. The state does not have an interest in prohibiting painless procedures that help alleviate suffering.

Prohibiting suicide may have once seemed proper to avoid citizens inflicting severe pain on themselves. Yet, through assisted suicide, patients now have the means to painlessly terminate their lives. *Glucksberg* failed to recognize that medical advancements provide patients a painless option to alleviate their suffering. Since patients have methods to painlessly die by suicide, prohibitions against assisted suicide are no longer warranted. When technological advancements create safe avenues to practice once dangerous activities, then the Court should track these advancements by recognizing new fundamental rights.

¹³⁹ *Roe v. Wade*, 410 U.S. 113, 149 (1973).

¹⁴⁰ Stobbe, *supra* note 112.

¹⁴¹ See *supra* notes 136–38.

¹⁴² *Roe*, 410 U.S. at 149.

C. Changes in America Demand That *Glucksberg* Be Overturned

This section investigates the *Glucksberg* ruling using the *Casey* analysis to evaluate whether changes since *Glucksberg* justify overturning it. First, this Part argues that *Glucksberg*'s ruling has become unworkable. Second, this Part discusses the reliance issues at stake in overturning *Glucksberg*. Third, this Part claims that *Glucksberg* has become an anachronism of society. Fourth, this Part presents facts that undermine arguments used in the majority opinion of *Glucksberg*. Lastly, this Part argues that although overturning precedent is difficult, *Glucksberg* should no longer remain good law.

1. *Glucksberg*'s Ruling Is an Unworkable Doctrine

The first *Casey* factor asks whether precedent has become unworkable.¹⁴³ Medical progress allows patients to live longer with terminal illness than ever before.¹⁴⁴ Nevertheless, medical advancements also open the door to a reality where patients are unnaturally kept alive and forced to suffer. The suffering some patients endure before death is inconceivable to people not suffering from these afflictions.¹⁴⁵ Patients do not consent to have their suffering prolonged just because it is medically possible. Doctors have advanced practices to keep people alive for a longer time without considering the effects this may have on suffering.¹⁴⁶ Suffering patients should have the freedom to peacefully die.

¹⁴³ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992).

¹⁴⁴ See generally Kim Painter, *Life After Cancer: More Survivors Live Longer, Face New Health Challenges*, USA TODAY (Dec. 15, 2019), <https://www.usatoday.com/in-depth/news/50-states/2019/02/13/life-after-cancer-survivors-oncology-survivorship-plans-long-term-health/2794121002/> (showcasing how early detection and better treatment have led many cancer patients to live years longer than expected); Rosalie Hayes, *Life Expectancy for People Living with HIV*, AIDS MAP (Nov. 2021), <https://www.aidsmap.com/about-hiv/life-expectancy-people-living-hiv> (reporting that people with HIV have as long of a life expectancy as someone without HIV, when properly treated).

¹⁴⁵ Paul Rousseau, *The Losses and Suffering of Terminal Illness*, 75 MAYO CLINIC PROC. 197, 197-98 (Feb. 1, 2000), [https://www.mayoclinicproceedings.org/article/S0025-6196\(11\)64195-5/fulltext](https://www.mayoclinicproceedings.org/article/S0025-6196(11)64195-5/fulltext).

¹⁴⁶ See Guy C. Brown, *Living Too Long*, 16 EMBO REPS. 137, 137 (2015) (claiming that longer lives increase the *quantity* of life, but not necessarily the *quality* of life); cf. JURASSIC PARK, at 36:11 (Universal City Studios & Amblin Entertainment 1993)

When one considers how much suffering is involved with various afflictions, denying patients the right to assisted suicide has become unworkable. Many patients are forced to endure suffering just because medical advancements make that suffering possible. “While it is true, of course, that inventions have given us tremendous power, it is absurd to suggest that we must use this power to destroy our most precious inheritance: liberty.”¹⁴⁷ Patients should have an option to escape their suffering through assisted suicide.

Furthermore, if precedent creates inconsistent results from drawing arbitrary distinctions, the Supreme Court should declare the precedent unworkable.¹⁴⁸ *Glucksberg* differentiates the right to die by abstention and the right to assisted suicide, claiming one is letting the patient die and the other is actually killing the patient.¹⁴⁹ However, several court opinions—both from the Supreme Court and lower courts—disagree with this distinction.¹⁵⁰ Patients who wish to die by removing life-sustaining equipment or from assisted suicide are both making a conscious decision to die.

One must use historical justifications to distinguish the act of removing life-sustaining equipment from assisted suicide, because one cannot differentiate these acts based on intent, outcome, or patient suffering. At the same time, “[r]eliance on history as an organizing

(“Your scientists were so preoccupied with whether or not they could, they didn’t stop to think if they should.”).

¹⁴⁷ FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 52 (1944).

¹⁴⁸ See *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 544–45 (1985) (showing how drawing lines between government and non-government functions on the basis of historical function, necessity, or other factors are based on arbitrary distinctions, and this type of analysis is unworkable because it leads to inconsistent results).

¹⁴⁹ *Washington v. Glucksberg*, 521 U.S. 702, 725 (1997).

¹⁵⁰ E.g., *Cruzan v. Mo. Dep’t of Health*, 497 U.S. 261, 296–97 (1990) (Scalia, J., concurring) (“Starving oneself to death is no different from putting a gun to one’s temple . . . the cause of death in both cases is the suicide’s conscious decision to ‘pu[t] an end to his own existence.’”); *Quill v. Vacco*, 80 F.3d 716, 729 (2d Cir. 1996) (finding a violation of the equal protection clause because “those in the final stages of terminal illness who are on life-support systems are allowed to hasten their deaths . . . but those who are similarly situated, except for the previous attachment of life-sustaining equipment, are not allowed to hasten death by self-administering prescribed drugs.”); *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1461 (W.D. Wash. 1994) (“From a constitutional perspective, the court does not believe that a distinction can be drawn between refusing life-sustaining medical treatment and physician-assisted suicide by an uncoerced, mentally competent, terminally ill adult.”).

principle results in line-drawing of the most arbitrary sort,” because it requires courts to predict future trends in America.¹⁵¹ By using historical context to distinguish two forms of dying, *Glucksberg* has created an unworkable distinction that has led to inconsistent results. This distinction is arbitrary and has proven to be an unworkable doctrine.

2. Overturning *Glucksberg* Will Not Negatively Affect Patients Relying on the Decision

The next *Casey* factor looks at whether overruling precedent will cause inequity to citizens who have come to rely on the precedent.¹⁵² *Casey* looked at how citizens had come to rely on *Roe v. Wade*.¹⁵³ The Court realized women had come to organize their lives around the fact they had a right to get an abortion.¹⁵⁴ Since women had come to rely on the right to have an abortion, it would have been unjust to overrule *Roe v. Wade*.¹⁵⁵

The reliance issues involved in *Roe v. Wade* are difficult to compare to the reliance issues of *Glucksberg*. Overturning *Roe v. Wade* would have meant removing a fundamental right, whereas overturning *Glucksberg* would entail creating a new fundamental right. With *Casey*, the reliance at issue was the reliance upon a granted fundamental right, where citizens had come to rely upon having this right protected. On the other hand, *Glucksberg* has left citizens to rely upon not having a fundamental right.

Although these reliance issues are different, overturning *Glucksberg* does not create negative equity in those relying upon the old rule. These patients have come to rely on the fact that they will endure severe pain and suffering. Overturning *Glucksberg* would not negatively affect this reliance, rather overturning *Glucksberg* would create a better situation for those relying upon the decision. Patients who are affected by the *Glucksberg* decision have come to rely upon a life of suffering, and overturning such reliance would be beneficial.

¹⁵¹ *Garcia*, 469 U.S. at 544.

¹⁵² *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992).

¹⁵³ *Id.* at 856.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

Moreover, to make a reliance argument, the citizens who wish to keep the law preserved must invoke reliance.¹⁵⁶ Citizens who do not desire assisted suicide are not relying on *Glucksberg* remaining precedent. If a citizen does not want to receive assistance in dying, then they would not be forced to die if assisted suicide was granted fundamental status. The only patients relying on *Glucksberg*'s outcome are those who desire assisted suicide.

Suffering patients are the ones relying on *Glucksberg*. Providing patients the right to receive assistance in dying will help these patients relieve their suffering. Simultaneously, no patient is relying on the fact that they are allowed to live if assisted suicide is prohibited. Permitting assisted suicide will positively affect patients who want to end their suffering, while having zero effect on patients who want to live. The only patients that have any stake in *Glucksberg*'s ruling are those who could benefit from overturning that decision.

3. *Glucksberg* Has Become an Anachronism of Society

The third *Casey* factor asks whether old precedent has become an anachronism of society.¹⁵⁷ One way to evaluate whether prior precedent has become an anachronism is to look at changing laws since the decision.¹⁵⁸ Many cases have used changing state laws to justify recognizing new fundamental rights, even if that meant overturning prior precedent.¹⁵⁹ When state law begins recognizing rights, the Court should take that as evidence of their incorrect decision and deviate from *stare decisis*.

For instance, *Lawrence v. Texas* overturned prior precedent that denied individuals the right to practice same-sex sodomy.¹⁶⁰

¹⁵⁶ See *Ramos v. Louisiana*, 140 S.Ct. 1390, 1406–08 (2020) (rejecting reliance arguments from states claiming judicial efficiency and integrity depended on prior precedent, instead recognizing citizens' interests in unanimous jury verdicts was the true reliance issue at stake).

¹⁵⁷ *Casey*, 505 U.S. at 855.

¹⁵⁸ *Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

¹⁵⁹ See *id.* at 585 (granting the right to same-sex sodomy); *Obergefell v. Hodges*, 576 U.S. 644, 661–62 (2015) (granting the right to same-sex marriage); *Ramos*, 140 S. Ct. at 1406 (granting the right to unanimous jury verdicts for criminal conviction).

¹⁶⁰ *Lawrence*, 539 U.S. at 573–74.

Bowers v. Hardwick denied the right to same-sex sodomy.¹⁶¹ However, after the *Bowers* decision, 12 states stopped prohibiting sodomy.¹⁶² The *Lawrence* decision observed society's conscience changing in regard to homosexual relationships, as manifested through changing state legislation.¹⁶³ These changes were viewed as proof of the *Bowers* decision becoming an anachronism of society.¹⁶⁴

Similar reasoning has also been reflected in the case *Ramos v. Louisiana*.¹⁶⁵ This case overturned precedent to declare unanimous jury verdicts in criminal trials a fundamental right.¹⁶⁶ Louisiana argued that since prior precedent permitted less than unanimous jury verdicts, the Court should adhere to *stare decisis*.¹⁶⁷ Nevertheless, the Court rejected this argument because the majority of states did not permit less than unanimous jury convictions.¹⁶⁸ Despite precedent permitting states to enact laws that allowed less than unanimous jury verdicts, many states chose not to follow this precedent.¹⁶⁹ State laws deviating from Supreme Court precedent offer evidence that the precedent may have been decided wrongly.

Likewise, states have begun acknowledging that citizens should have the right to MAID.¹⁷⁰ There are currently nine states that permit MAID by statute,¹⁷¹ and one state that permits MAID per judicial ruling.¹⁷² Additionally, Washington, D.C. also grants its citizens the right to MAID.¹⁷³ Since the *Glucksberg* ruling, jurisdictions have begun recognizing that patients should have the right

¹⁶¹ *Bowers v. Hardwick*, 478 U.S. 186, 195 (1986).

¹⁶² *Lawrence*, 539 U.S. at 573.

¹⁶³ *Id.* (noting that even in states that still had laws prohibiting same-sex relationships, the states did not enforce those laws).

¹⁶⁴ *Id.*

¹⁶⁵ *Ramos v. Louisiana*, 140 S. Ct. 1390, 1406 (2020).

¹⁶⁶ *Id.* at 1408.

¹⁶⁷ *Id.* at 1406.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ See *supra* notes 113–16.

¹⁷¹ See DEATH WITH DIGNITY, *State Statute Navigator*, *supra* note 113. Some states use the term *Medical Aid in Dying* specifically, whereas others use the phrase *self-administered medication* to end one's life. See *supra* Part I.B. (providing definitions for both terms, which are functionally equivalent).

¹⁷² *Baxter v. Montana*, 224 P.3d 1211, 1222 (Mont. 2009).

¹⁷³ DEATH WITH DIGNITY, *State Statute Navigator*, *supra* note 113.

to MAID. This provides a compelling argument that the *Glucksberg* decision has become an anachronism of society.

Although Supreme Court precedent carries binding authority, it is not unshakable. Sometimes the Court must look to how laws have progressed throughout the nation to make its decisions. If in the years following a decision state laws deviate from that decision, that should be evidence of the decision becoming an anachronism. After *Glucksberg*, various jurisdictions have ignored the Court's decision, thus offering proof that *Glucksberg* should be overturned.

Furthermore, if a rule causes confusion or direct obstacles to other laws and policies, then the Court will consider the rule an anachronism.¹⁷⁴ The *Glucksberg* decision does not present a direct obstacle to other laws, but the *Glucksberg* decision does cause confusion. *Glucksberg* has caused confusion in both the medical and legal spheres and should not be binding precedent.

First, the *Glucksberg* decision has caused confusion in medical practice. The United States recognizes the right to abstain from life-sustaining medical treatment as a fundamental right.¹⁷⁵ Nonetheless, the Court has made a distinction between the right to die through abstention and the right to die by suicide.¹⁷⁶ Some have called this metaphysical distinction arbitrary.¹⁷⁷ Giving patients the right to die by some means, but not the right to die by suicide, creates a confusing distinction between two life-ending procedures.

Second, *Glucksberg* causes confusion in the legal profession. In *Vacco v. Quill*, the Court was presented with the issue of whether denying patients the right to assisted suicide denied them equal protection of the law.¹⁷⁸ Respondents argued that refusing life-sustaining medical equipment was the same as patients dying by suicide: if a patient has the right die, the method of death should not matter.¹⁷⁹ However, *Vacco* reaffirmed the distinction created in

¹⁷⁴ *Patterson v. Mclean Credit Union*, 491 U.S. 164, 173 (1989).

¹⁷⁵ *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 279 (1990).

¹⁷⁶ *Washington v. Glucksberg*, 521 U.S. 702, 725 (1997).

¹⁷⁷ See Helene Brodowski & Marybeth Malloy, *Suffering Against Their Will: The Terminally Ill and Physician Assisted Suicide—A Constitutional Analysis*, 12 ST. JOHN'S J. L. COMMENT. 171, 183–86 (1996) (claiming physicians play an active role in assisted suicide and removal of life-sustaining equipment).

¹⁷⁸ *Vacco v. Quill*, 521 U.S. 793, 797 (1997).

¹⁷⁹ *Id.* at 798.

Glucksberg.¹⁸⁰ *Vacco* may have upheld *Glucksberg*, but *Vacco* only occurred because of *Glucksberg*'s ruling.¹⁸¹

The ruling in *Glucksberg* has directly led to serious debates between the right to die through abstention and the right to die by suicide.¹⁸² Distinguishing between the right to die by abstention and assisted suicide causes confusion in both the medical and legal fields. *Glucksberg* has caused confusion because it tries to arbitrarily differentiate two methods of dying. The *Glucksberg* decision creates unnecessary confusion and consequently has become an anachronism of society.

4. Recent Studies Invalidate Premises Relied upon in *Glucksberg*

For the last *Casey* factor, the Court must consider whether new information invalidates premises relied upon by the prior decision.¹⁸³ Discussed below are a few things that have changed since *Glucksberg*. These changes invalidate *Glucksberg*'s premises which led to the conclusion that assisted suicide was not a fundamental right. Since the Court's premises have proven false their conclusion should be overturned.

The *Glucksberg* opinion was premised on the idea that if assisted suicide was legalized, then vulnerable patients may be coerced to kill themselves. The *Glucksberg* decision was concerned with protecting vulnerable patients when it decided assisted suicide was not a fundamental right.¹⁸⁴ The Court worried that suffering may lead patients to wrongly think they wish to die when the patient may just be depressed.¹⁸⁵ Justices also feared that patients might decide to die,

¹⁸⁰ *Id.* at 807.

¹⁸¹ The issue in *Vacco* was whether prohibiting assisted suicide, while permitting removal of life-sustaining equipment, violated the Equal Protection clause. If *Glucksberg* had declared assisted suicide a fundamental right, then this case would not have been argued. *Id.* at 797.

¹⁸² See *supra* notes 178–81.

¹⁸³ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992).

¹⁸⁴ See *Washington v. Glucksberg*, 521 U.S. 702, 730–31 (1997) (declaring the state had an interest in protecting vulnerable patients such as those suffering with depression, disabilities, and economic difficulties).

¹⁸⁵ *Id.* at 730.

rather than be flooded with medical debt.¹⁸⁶ Even assuming these concerns are legitimate, these concerns have since proven false.¹⁸⁷

There is little evidence that vulnerable patients are more likely to seek assisted suicide.¹⁸⁸ In states and countries where assisted suicide is legal, assisted suicide is responsible for very few deaths per year.¹⁸⁹ Assisted suicide accounts for roughly 0.15% of deaths in Oregon, and less than 2% of all deaths in the Netherlands.¹⁹⁰ What is more, the Oregon Board of Medical Examiners has received zero reports of abuse or coercion against patients seeking MAID since legalizing the practice.¹⁹¹

Additionally, there is no evidence financial insecurities play a significant role in a patient's decision to receive assistance in dying.¹⁹² Studies have shown patients with higher education, better economic standing, and health insurance are more likely to participate in assisted suicide.¹⁹³ The studies appear to suggest that citizens in better financial situations are more likely to seek assisted suicide. If there is little worry of financial coercion against patients receiving aid in dying, then another one of the Court's concerns is absolved.

Glucksberg also presented worries of assisted suicide progressing to involuntary euthanasia.¹⁹⁴ Using a slippery slope analysis, the Court claimed that legalizing assisted suicide would lead

¹⁸⁶ *Id.* at 732.

¹⁸⁷ *See infra* notes 188–93.

¹⁸⁸ Researchers studied suicide rates among the elderly, children, people with lower education, the poor, the physically disabled, people with medical illness, and minorities, in places that had legalized assisted suicide. This study found that none of these groups had an elevated rate of assisted suicide. However, the study did find an increased rate of assisted suicide among AIDS patients. *No 'Slippery Slope' Found with Physician-Assisted Suicide*, PATIENT CARE (Sept. 27, 2007), <https://www.patientcareonline.com/view/no-slippery-slope-found-physician-assisted-suicide>.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Peter Singer, *Making Our Own Decisions About Death*, FREE INQUIRY 36, 37 (Aug.–Sept. 2005).

¹⁹² PATIENT CARE, *No 'Slippery Slope' Found with Physician-Assisted Suicide*, *supra* note 188.

¹⁹³ *See id.* (reporting that people above average in education and wealth are more likely to seek assisted suicide); Singer, *supra* note 191 (finding that only people with health insurance sought assisted suicide since Oregon legalized the practice, and that college educated individuals were eight times more likely to ask for assisted suicide).

¹⁹⁴ *Washington v. Glucksberg*, 521 U.S. 702, 732 (1997).

to legal euthanasia, and then to involuntary euthanasia.¹⁹⁵ By contrast, studies show that legalizing assisted suicide does not increase involuntary euthanasia rates.¹⁹⁶ Similarly, there is no evidence that legalizing voluntary euthanasia, in addition to assisted suicide, increases the rate of involuntary euthanasia.¹⁹⁷ Assisted suicide does not lead to involuntary killings, thus eliminating another concern from *Glucksberg*.

Protecting vulnerable patients from being coerced into dying by suicide is a legitimate state interest. That said, evidence suggests that coercion is not a concern related to assisted suicide, hence invalidating the conclusion of that argument. The *Glucksberg* decision is based on incorrect premises and should no longer be binding precedent. When time demonstrates the inaccuracies in an argument, the Court should have a duty to overturn incorrect rulings.

5. The High Bar To Overturn Precedent

The Court is cautious to overturn precedent, often adhering to *stare decisis*.¹⁹⁸ To overcome precedent one must show “a ‘special justification,’ over and above the belief ‘that the precedent was wrongly decided.’”¹⁹⁹ *Stare decisis* permits predictable outcomes in court, allows for reliance on prior rulings, and promotes integrity of the judicial system.²⁰⁰ The Supreme Court recognizes the importance of *stare decisis*; nevertheless this doctrine is not infallible.²⁰¹

Stare decisis is powerful, but that does not mean precedent is impossible to overturn.²⁰² One must look to precedent for guidance,

¹⁹⁵ *Id.* at 732–33.

¹⁹⁶ See Christopher J. Ryan, *Pulling up the Runaway: The Effect of New Evidence on Euthanasia’s Slippery Slope*, 24 J. MED. ETHICS 341, 343 (1998) (reporting that neither the Netherlands nor Australia have seen an increase in involuntary euthanasia since legalization of assisted suicide).

¹⁹⁷ Penney Lewis, *The Empirical Slippery Slope from Voluntary to Non-Voluntary Euthanasia*, 35 J. L., MED. & ETHICS 197, 201 (2007).

¹⁹⁸ *Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020).

¹⁹⁹ *Id.* (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014)).

²⁰⁰ *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

²⁰¹ *Id.*

²⁰² *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020).

but *stare decisis* “isn’t supposed to be the art of methodically ignoring what everyone knows to be true.”²⁰³ If a powerful enough reason exists, then the Court may ignore *stare decisis* and create new precedent.²⁰⁴ Failing all four *Casey* factors provides strong justification to overturn precedent.²⁰⁵

Glucksberg fails all four *Casey* factors miserably and should be overturned. *Glucksberg*’s ruling is unworkable, causes suffering, arbitrarily distinguishes two end-of-life procedures, and the conclusion is not logically supported. The faults in *Glucksberg* have become evident; this was a bad ruling and has only caused misery among the populous. Although overruling precedent may be difficult, *Casey* provides an opportunity to overturn rulings that were incorrect. The Court is wise, but it is not infallible, and mistakes should be corrected. *Glucksberg*’s ruling is erroneous and should no longer remain as precedent.

Even though *stare decisis* should guide judicial decision making, there are times where deviating from precedent is necessary.²⁰⁶ The Court has overturned numerous decisions to create new fundamental rights.²⁰⁷ Fundamental rights are so important that when precedent denies citizens them, the doctrine of *stare decisis* should be ignored. Denying citizens a fundamental right is one of the strongest reasons to overturn precedent, and *Glucksberg* has wrongly denied citizens the right to assisted suicide.

Admittedly, it is difficult to overturn precedent, but drastic situations call for deviations from prior rulings. Is there any reason more compelling to overturn precedent than the opportunity to provide citizens with rights that were wrongly denied? *Glucksberg*’s ruling does not respect citizen autonomy. What is more, the ruling has been the cause of unknowable suffering among the terminally ill. If any

²⁰³ *Id.*

²⁰⁴ *Janus*, 138 S. Ct. at 2478.

²⁰⁵ *Id.* at 2478–79.

²⁰⁶ *Id.* at 2478.

²⁰⁷ *E.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (deviating from precedent to give students the right to non-segregated public schools); *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (deviating from precedent to establish the right to same-sex sodomy); *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) (overturning precedent to create the right to same-sex marriage); *Ramos*, 140 S. Ct. at 1408 (overturning precedent to provide citizens the right to unanimous jury verdicts in criminal trials).

decision deserves to be overturned, it is the decision that has deprived patients the right to a dignified death.

D. The Penumbra of Rights Test and Assisted Suicide

This section argues that the right to life should encompass the right to assisted suicide. One cannot have a right to life if they are forced to live. If we assume that a right to life exists, then that must encompass the right to choose life. Recognizing someone's right to life should entail recognizing that everyone has a right to live and that they also have a right to die.

First, this section outlines the historical recognition of the right to life. Then after describing the right to life, this section compares the right to life with other fundamental rights. Ultimately, this Part argues that the right to life is unfairly limited compared to other rights. Finally, this section concludes by comparing assisted suicide to wrongful deaths.

1. The Essential Nature of the Right to Life

The United States has long held the right to life to be a right which deserves the utmost respect. The Fifth Amendment reads: "No person shall be . . . deprived of life, liberty, or property, without due process of law."²⁰⁸ The Fourteenth Amendment similarly says the state shall deprive no citizen of life without due process.²⁰⁹ The Declaration of Independence also mentions three unalienable rights, the rights to life, liberty, and the pursuit of happiness.²¹⁰ The right to life is mentioned explicitly in foundational documents of the United States because this right is essential to the American conscious.

In addition, several Supreme Court cases have recognized the right to life. *Roe v. Wade* recognized the duty to protect a fetus's life after some development.²¹¹ Additionally, in capital punishment cases, Justices tend to tread lightly when justifying whether a crime deserves

²⁰⁸ U.S. CONST. amend. V.

²⁰⁹ U.S. CONST. amend. XIV, § 1.

²¹⁰ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

²¹¹ *Roe v. Wade*, 410 U.S. 113, 159 (1973).

the death penalty.²¹² The Court recognizes that only the most severe crimes should justify death because the state has a duty to respect human life.²¹³ Finally, the right to life has been discussed in end-of-life cases as a strong state interest.²¹⁴

The United States recognizes there is a fundamental right to life for all citizens. Although there is a recognized right to life, the United States has failed to fully recognize this right. *Glucksberg* used the established right to life as an argument against the right to assisted suicide.²¹⁵ However, the *Glucksberg* decision did not consider the “right” to life, but rather imposed a duty to live.²¹⁶

A right is defined as “something to which one has a just claim.”²¹⁷ Conversely, the *Glucksberg* analysis did not view the right to life in this regard; instead the Court viewed life as a duty imposed by existence. The Supreme Court has recognized many fundamental rights. Simply put, the declaration of rights does not impose duties, rather, rights provide citizens with an opportunity to choose. Patients should have the right to choose when to die, and patients should not be coerced by the state to remain alive.

2. The Right to Life is Not Shown the Same Level of Respect as Other Rights

As discussed, the United States recognizes there is a right to life.²¹⁸ Yet, the Court in *Glucksberg* imposed a duty to live, failing to

²¹² *E.g.*, *Kennedy v. Louisiana*, 554 U.S. 407, 446 (2008) (declaring capital punishment too severe a punishment for child rape); *Woodson v. North Carolina*, 428 U.S. 280, 304–05 (1976) (plurality opinion) (declaring mandatory capital punishment statutes unconstitutional because capital punishment should be reserved for the most severe offenders and actions, which requires a case-by-case analysis).

²¹³ *See Roper v. Simmons*, 543 U.S. 551, 568 (2005) (asserting that the death penalty should only be reserved for the most culpable criminals, committing a narrow category of crimes).

²¹⁴ *Compare* *Washington v. Glucksberg*, 521 U.S. 702, 730 (1997) (claiming the State’s interest in protecting vulnerable patients’ lives justified the prohibition of assisted suicide), *with* *Cruzan v. Mo. Dep’t of Health*, 497 U.S. 261, 286–87 (1990) (requiring clear and convincing evidence that a patient wishes to be removed from life sustaining equipment to ensure the patient’s wishes are protected).

²¹⁵ *Glucksberg*, 521 U.S. at 728–30.

²¹⁶ *See supra* Part II.C.1.

²¹⁷ *Right*, MERRIAM-WEBSTER (11th ed. 2020).

²¹⁸ *See supra* notes 211–16.

recognize that the right to life should include the right to choose life. Rights provide citizens the option to invoke the right, but they also present citizens with the option to abstain from said right. If one compares how other rights are treated, then assisted suicide should be a permitted practice under the right to life.

To begin, many fundamental rights provide citizens with the right to abstain from practicing said right. For instance, one has the right to marry whomever they wish.²¹⁹ The Court recognizes a right to marry, but America does not mandate citizens get married.²²⁰ The right to marry is actually the right to choose if and to whom one wishes to marry, not the duty to marry. Similarly, the right to life should provide citizens with the option to live if they so choose.

However, giving citizens the ability to choose life does not mean there should be a duty to live. If a patient cannot invoke their right to die, then the right to life does not actually entail a choice. Patients who “choose” to live are not choosing, rather these patients are yielding to the government’s imposed duty that each citizen continue to live against their will. In order to respect the right to life, citizens should be given the autonomy to live or die. Citizens who want to live are assured their right to life is protected. On the contrary, citizens who want to die have been stripped of their right to choose.

Every citizen should have the freedom to choose whether they will evoke a fundamental right. The right to marriage recognizes that each citizen has the right to find happiness, either through marriage or by remaining single. Likewise, the right to life should permit citizens to decide whether continuing life or dying will help fulfill the citizen’s desires. If a patient determines that death is preferable to life, then that patient should be allowed to die.

On the other hand, one could argue assisted suicide is not choosing between having a life and not having a life. Rather, assisted suicide is the choice to end a life one already has. In this respect,

²¹⁹ See generally *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) (identifying the right to same-sex marriage); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (identifying the right to interracial marriage); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (declaring the right to marry as “essential to the orderly pursuit of happiness by free men”).

²²⁰ “Under our Constitution, the freedom to marry, *or not marry*, a person of another race resides with the individual and cannot be infringed by the State.” *Loving*, 388 U.S. at 12 (emphasis added).

assisted suicide could perhaps be more fairly compared to a divorce than the right to abstain from marriage in the first place. However, this should not be a concern, since other rights do allow one to abstain from something to which they are already committed.

There are many rights that permit someone to abandon prior commitments. The right to choose marriage is fundamental, yet every state permits divorce.²²¹ Moreover, citizens have the right to enter into a contract, and the contract parties have the right to mutually consent to end their contract.²²² Additionally, one has the right to get pregnant, but one also maintains the right to an abortion.²²³ If one may end commitments towards marriage, contracts, and pregnancy, then patients should be able to end their commitment to life.

In addition to allowing one to end commitments to other rights, the right to life is inherently different because no one consents to being born. If our country permits citizens to terminate rights the citizen chose to invoke, then it should also recognize the right to terminate a non-consensual arrangement. If one can imagine a marriage so negative that it justifies ending said marriage, then one can imagine a life so full of despair it justifies assisted suicide. When life contains “more negative elements than positive ones—more unhappiness than happiness, more thwarting of preferences than satisfaction of them,” an individual may desire death by suicide.²²⁴

The decision whether to endure unfathomable suffering or to end one’s life should be the patient’s decision. The United States recognizes the right to terminate already consented to situations; nevertheless, there is no right to terminate an existence we were all thrust into. There is nothing more intimate than one’s death; every human is always making progress towards their own personal death.²²⁵

²²¹ *State Legal Requirements for Divorce*, FINDLAW, <https://statelaws.findlaw.com/family-laws/divorce-legal-requirements.html> (last visited Apr. 22, 2022).

²²² *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

²²³ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869 (1992).

²²⁴ Singer, *supra* note 191, at 36.

²²⁵ “[Humankind] . . . has in every case already been delivered over to its death. In being towards its death, [humankind] is dying factually and indeed constantly, as long as it has not yet come to its demise.” HEIDEGGER, *supra* note 98, at 289, 303 (“Death is a way to be, which [existence] takes over as soon as it is. ‘As soon as man comes to life, he is at once old enough to die.’”).

Although death is an extremely intimate affair, patients are not permitted to make their own end-of-life decisions.

3. Assisted Suicide and Wrongful Killings

Where life is protected, it is protected against deprivation by others. The Fourteenth Amendment says citizens may not be deprived of life without due process.²²⁶ However, this Amendment only concerns government deprivation of life.²²⁷ Accordingly, the Fourteenth Amendment does not concern private conduct such as a patient receiving assistance in suicide.

Similarly, assisted suicide is unlike other situations where the state justifiably prohibits killing a person. The state prohibits killing a person in order to protect an individual's right to life. All the same, assisted suicide can be distinguished in two regards: (1) assisted suicide is consented to; and (2) patients receiving assisted suicide believe that death would not deprive them of life's benefits.

The first distinction between assisted suicide and other killings is the fact that one must consent to assisted suicide. Non-consensual sexual activities are federally illegal,²²⁸ but the United States permits adults to consent to sex. Similarly, when someone strikes another person against that person's consent, the striker will be charged with assault.²²⁹ What makes most criminal action wrong is the fact that a person is impacted against their consent. If a patient provides informed consent,²³⁰ then assisted suicide should be permissible.

In addition to providing consent, patients who request assisted suicide have determined that their state of suffering has surmounted the possible benefits of life. A patient's suffering may be so great as to

²²⁶ U.S. CONST. amend. XIV, § 1.

²²⁷ The Fourteenth Amendment protects against government actions, however, "[t]hat Amendment erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

²²⁸ 18 U.S.C. §§ 2241–2244.

²²⁹ *Id.* § 113(a)(4).

²³⁰ See *Informed Consent Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/i/informed-consent/> (last visited Apr. 22, 2022) (describing informed consent as an agreement to do something only if all relevant facts have been disclosed).

numb the patient to all pleasures.²³¹ When an individual is deprived of all their dreams and desires, that individual may long for death.

If a person with unimpaired capacities for judgment comes to the conclusion that his or her future is so clouded that it would be better to die than to continue to live, the usual reason against killing—that it deprives the being killed of the goods that life will bring—is turned into its opposite, a reason for acceding to that person’s request.²³²

Providing patients assistance in death should not be prohibited.

Assisted suicide is not a killing that the state has an interest in prohibiting. Killing is wrong when performed on non-consenting individuals. Killing is also wrong when it deprives one of the benefits of life. Conversely, assisted suicide is performed on consenting patients who believe that they only have a life of pain, anxiety, and other debilitating symptoms to look forward to. The *Glucksberg* decision requires that patients remain alive; forcing patients to remain alive creates a duty to live and ignores a patient’s right to life.

If the United States recognizes a right to life, it should treat life as a right, not a duty. Rights are something one may claim; they do not impose obligations on citizens. One may abstain from other rights, but citizens are not given this option in regard to the most personal, intimate right one possesses: the right to life. “[T]hey make the nonsensical remark that suicide is *wrong*, when it is quite obvious that there is nothing in the world to which every man has a more unassailable title than to his own life and person.”²³³

²³¹ See Cees D.M. Ruijs et al., *Symptoms, Unbearability and the Nature of Suffering in Terminal Cancer Patients Dying at Home: A Prospective Primary Care Study*, 14 *BIO MED CENT. FAM. PRAC.* 201, 204 (2013) (reporting that many terminally ill cancer patients experience unbearable pain, an unbearable sense of loss of control over one’s life, and a prevalent fear of future suffering).

²³² Singer, *supra* note 191.

²³³ SCHOPENHAUER, *supra* note 110, at 25 (emphasis in original). Cf. MILAN KUNDERA, *THE UNBEARABLE LIGHTNESS OF BEING* 299 (Michael Henry Heim trans., 2009) (“Dogs do not have many advantages over people, but one of them is extremely important: euthanasia is not forbidden by law in their case; animals have the right to a merciful death.”).

III. SOLUTION

This Note explored three tests employed by the Supreme Court to evaluate fundamental rights. The Court has not specified which test is appropriate, leading to inconsistent inquiries. As a result, opinions will sometimes analyze fundamental rights through a hybrid approach, where arguments from multiple tests are blurred into one jumbled investigation.²³⁴ Moreover, giving Justices the option to employ the test of their choosing creates the opportunity to shape arguments in their favor. This could lead to decisions based not on merit, but rather based on Justices' personal opinions. To create clarity within fundamental rights jurisprudence, the Court should adopt a three-prong test for fundamental rights.

The Court should utilize each of the three existing fundamental rights tests as the three prongs for the new test. Each asserted right should be evaluated using the historic test, the changing conscience test, and the penumbra of rights test. If there is a compelling enough argument under one test, then that should convince the Court of the asserted right's fundamental nature. Evaluating an asserted right through each fundamental rights test will provide many benefits to fundamental rights jurisprudence.²³⁵

To begin, creating a new, concrete test will help create clarity in the realm of Supreme Court jurisprudence. Currently there is little consistency in fundamental rights analysis.²³⁶ This Note showcased three general tests at the Court's disposal, however, the Court has not decided which approach is the most fitting. Creating this new test

²³⁴ See generally *Roe v. Wade*, 410 U.S. 113, 149–54 (1973) (justifying the right to abortion through both the changing views of society and the right to privacy); *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 277–79 (1990) (declaring the right to remove life-sustaining equipment as embedded in the tradition of informed consent and subsumed under the right to personal autonomy); *Lawrence v. Texas*, 539 U.S. 558, 570–73 (2003) (stating the right to privacy and society's changing conscience justified the fundamental right to same-sex sodomy).

²³⁵ See Mitchell Chervu Johnston, *Stepification*, 116 Nw. U. L. REV. 383, 429–31 (2021) (arguing that multi-step analyses provide the perception of order, can help simplify the law, are useful to organize legal arguments, and help appellate courts analyze lower court arguments).

²³⁶ “The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, ‘has not been reduced to any formula.’” *Obergefell v. Hodges*, 576 U.S. 644, 663–64 (2015) (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

would establish a clear-cut rule on how to evaluate an asserted right. This would avoid inconsistency in fundamental rights cases, because each asserted fundamental right would be investigated from a consistent point of analysis. This would further eliminate worries about which test should be employed. If all three tests are always employed, one does not need to be concerned with which test is the most appropriate.

Furthermore, this new three-pronged approach would ensure that each asserted right is given its due consideration by the Court. If an asserted right is evaluated using all three tests, then Justices will carefully evaluate that right. This is important because asserted fundamental rights should not be dismissed without proper deliberation. It is essential that asserted rights are given proper due diligence to ensure the Court does not overlook an asserted right.

Moreover, the new three-pronged test would help avoid judge-made law. As mentioned in Part I, *Glucksberg* approached the asserted right to assisted suicide through a very narrow historic lens.²³⁷ If new fundamental rights can only be recognized through that specific act's historical practice, then it will be difficult to recognize new rights.²³⁸ If Justices wish to deny an asserted right the rank of fundamental, then employing only the narrow historic test for fundamental rights will help promote this motive.

On the other hand, if Justices wish to rank a right fundamental, they may have more success with the penumbra of rights test. The penumbra of rights test can be used to rank a right fundamental in somewhat abstract terms. The Court needs to approach fundamental rights carefully because ranking new rights fundamental places the right "outside the arena of public debate and legislative action."²³⁹ With this in mind, it is important that overzealous Justices employing the penumbra of rights test do not rank every right fundamental.

The three-pronged test will help eliminate the possibility of Justices employing the fundamental rights test which best accomplishes the Justice's desires. Justices should not be able to employ one test just because the Justice will have more success

²³⁷ See *supra* Part I.C.

²³⁸ *Obergefell*, 576 U.S. at 671.

²³⁹ *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

pushing their opinion under that test. Evaluating fundamental rights through each fundamental rights test will ensure Justices evaluate an asserted right from all perspectives. Hopefully this will eliminate the risk of Justices employing different tests for personal motives.

While this new test could bring many benefits, it will unfortunately sacrifice efficiency. Evaluating an asserted right using all three fundamental rights tests would result in a very searching analysis. Though the decision would be well informed, it would likely take considerable time and research. Nevertheless, when tasked with something as important as determining fundamental rights, the case should not be overlooked for efficiency's sake. Creating a new fundamental right, or denying one asserted, is a major decision that should receive the Court's full attention.

The Supreme Court should adopt a new test for fundamental rights. Utilizing this new three-pronged test would provide clear guidance into evaluating asserted fundamental rights. Moreover, this test would ensure every asserted right is given the respect of comprehensive deliberation, coming to a well-reasoned decision. Lastly, and most importantly, employing this test would ensure Justices do not employ whichever test best suits their desires.

CONCLUSION

Denying patients the right to assisted suicide is depriving patients of a very intimate, personal decision. Patients have been denied the right to assisted suicide for too long. It is time this injustice is corrected by overturning the Court's decision in *Glucksberg*. The decision to continue life, or to die peacefully, should be the patient's decision.

Suffering patients are the only ones who should make the choice to continue living. If a patient determines that their suffering has surmounted the benefits of life, that patient should have the autonomy to die. America respects patient autonomy; nevertheless patients who want to die by suicide are denied autonomy over their own life and person. To fix this wrong, it is time that assisted suicide be recognized as a fundamental right.

There are many reasons assisted suicide should receive fundamental status. Citizens have the right to hasten their death and

risk their lives. Furthermore, many people recognize that suffering patients should have the liberty to die. Moreover, distinguishing between the right to die by abstention and the right to assisted suicide is an arbitrary distinction that should not be enforced. In addition, assisted suicide is a painless procedure that can help patients end their suffering. Finally, if there truly is a right to life, then citizens not only have a right to live, but a right to die.