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Friedman: Assisted Suicide PHYSICIAN ASSISTED SUICIDE

Leon Friedman

Honorable Leon D. Lazer:

We used to have on our faculty a very distinguished and important authority on constitutional law, Leon Friedman¹, who is now a professor at Hofstra Law School as well as our next speaker. In addition, Professor Friedman was formerly associated with a small firm by the name of Kaye, Scholer, Fierman, Hays & Handler, director of the Committee for Public Justice, staff attorney for the American Civil Liberties Union. Further, he has written extensively on numerous Supreme Court issues of critical importance, authored books as well as leading law journal articles, and directed several important committees for the Association of the Bar. Similarly, everyone on this committee seems to be doing their share of important work. However, Leon Friedman's background is unique, and we are extremely pleased to have him as one of our speakers today. So now on the very interesting subject of assisted suicide, Leon Friedman.

Professor Leon Friedman:

As we all know and will recall, the Supreme Court decided to hear two cases precisely dealing with a narrow issue, namely,

¹ LL. B. 1960 Harvard, Admitted New York Bar, 1961. Graduate Student, History, Harvard GSAS; 1954-55; Assoc. Kaye, Scholer, Fierman, Hays & Handler, NY 1960-67; Gen. Counsel, Chelsea House Publishers, 1968-70; Associate Director NYC Bar Association Special Committee on Courtroom Conduct, 1970-73; Staff Counsel ACLU 1973-74; Associate Professor Hofstra 1974-80; Professor since 1980.

doctor assisted suicides.² Ironically, the two cases are what law professors dream about encountering in practice, because one case involves substantive due process, the case out of Washington,³ and the other case raises the issue of equal protection.⁴ In any event, what you have to do, and as the court did for us here, is go through very detailed descriptions of these two different doctrines. However, it is not easy to distinguish between substantive due process and equal protection. On the one hand, the Supreme Court cases dealing with equal protection,⁵ teach us that under the strict scrutiny analytical framework,⁶ any time a fundamental right is violated, it is subject to strict scrutiny under the Equal Protection Clause. On the other hand, we may

² See *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997); *Vacco v. Quill*, 117 S. Ct. 2293 (1997).

³ *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997). In *Washington*, three physicians, along with others, brought suit against the State of Washington alleging that a state statute that banned assisted suicide was on its face unconstitutional as being violative of the Fourteenth Amendment. *Id.* at 2261. The district court held for plaintiffs, but the Court of Appeals for the Ninth Circuit reversed. *Id.* at 2262. The Supreme Court held that there was no fundamental liberty interest in the plaintiff's asserted right to assistance in committing suicide. *Id.* at 2262. Further, the legislation at issue was constitutional as being rationally related to legitimate government interests. *Id.*

⁴ *Vacco v. Quill*, 117 S. Ct. 2293 (1997). In *Vacco*, physicians brought an action against a New York statute making criminal the act of aiding a person to commit suicide. *Id.* at 2296. The District Court granted summary judgment for the defendants and the Court of Appeals for the Second Circuit reversed. *Id.* The Supreme Court held that the statute was not violative of the equal protection rights granted by the federal Constitution. *Id.* at 2310. Interestingly, the Court left open the door to future challenges to the prohibition of physician assisted suicide; "our holding . . . does not foreclose the possibility that some applications of the New York Statute may impose an intolerable intrusion on the patient's freedom." *Id.*

⁵ U.S. CONST. amend. XIV, § 1. This section provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

⁶ See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §16-6, at 1000-02 (2d ed.1988) (stating that for a law to survive strict scrutiny it must further a compelling state interest by the most tailored means available); see generally *Adarand Contractors v. Peña*, 115 S. Ct. 2097 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

have substantive due process analysis which is quite broad.⁷ The Supreme Court noted in *Meyer v. Nebraska*,⁸ that “liberty” protected by the Due Process Clause includes the right of an individual “to marry, establish a home and bring up children to worship God according to the dictates of his own conscience, and generally to enjoy those principles long recognized at common law as essential to the orderly pursuit of happiness by free men.”⁹ In essence, therein lies the difference between a fundamental right under the equal protection clause and your right under the rigors of substantive due process analysis. Some years ago the Supreme Court heard a case involving a person who wanted to get married according to Wisconsin law.¹⁰ In Wisconsin, before a person with a child support obligation can become married, he had to obtain permission from the judge in order to comply with Wisconsin state law on the issue. The Supreme Court declared the Wisconsin statute unconstitutional and reasoned that the right to marry is fundamental.¹¹ In other words, if you have to ask for permission before you exercise that right, it is a violation of equal protection.

A few years later the Supreme Court heard *Moore v. City of East Cleveland*,¹² a case dealing with extended families who may

⁷ Substantive due process concerns involve the area of law surrounding the rights of “privacy and personhood.” See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §15-1, at 1302 (2d ed.1988).

⁸ 262 U.S. 390 (1923).

⁹ *Id.* at 399.

¹⁰ *Zablocki v. Redhail*, 434 U.S. 374 (1978). *Zablocki* involved a Wisconsin resident, who according to provisions of the State's statute, was prevented from entering into a legal and valid marriage in Wisconsin or elsewhere as long as that person maintained their Wisconsin residency. *Id.* at 376. The court struck down the statute on Equal Protection grounds, and concluded that strict scrutiny “was required because the classification created by the statute infringed upon a fundamental right, the right to marry.” *Id.* at 381.

¹¹ *Id.* at 390-391. See *Loving v. Virginia*, 388 U.S. 1, 11 (1967). *Loving* involved an interracial couple who were convicted after having violated Virginia's miscegenation laws. *Id.* at 2. The Court held that the statute arbitrarily deprived the couple of their freedom to marry, a fundamental liberty protected by the Equal Protection Clause. *Id.* at 12.

¹² *Moore*, 431 U.S. at 497.

live together in a single household. In East Cleveland, the city had passed an ordinance that unrelated people cannot live in the same house.¹³ “Who are unrelated people?” you ask.

Well, if the grandmother lived with two grandchildren who were sister and brother, they are related, but if a grandmother lived with two grandchildren who were first cousins, they were not related. As a result, the city law would prohibit the grandmother living with her two grandchildren who were not in the right degree of relationship that the law required.¹⁴ The law would also be vulnerable to attack on substantive due process grounds.¹⁵

Indeed, if the right to marry is protected by equal protection, but the right to live in the family unit is protected by substantive due process, the question becomes at what point do we have one and at what point do you have the other? It appears that on Monday the Court will focus on due process and on Tuesday it

¹³ *Id.* at 495-96. Section 1341.08 (1966) of the Housing Code of the city of East Cleveland Ohio provided in pertinent part:

“Family” means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:

- (a) Husband or wife of the nominal head of the household.
- (b) Unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them.
- (c) Father or mother of the nominal head of the household or of the spouse of the nominal head of the household.
- (d) Notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished for him by the nominal head of the household and the spouse of the nominal head of the household.
- (e) A family may consist of one individual.

Id.

¹⁴ *Id.*

¹⁵ *Id.*

will center itself on the issue of equal protection. Of course, it really depends on what day the case comes down, for it's a little hard to distinguish between those two doctrinal areas.

The critical point at issue here is the fact that we have these very general, amorphous phrases in the Constitution. At times they overlap, cover similar rights or identical interests, and yet the Supreme Court does not establish hard and fast distinctions, does not establish hard and fast limits on them, and does not establish a hard and fast division between the two broad concepts.

Another precise, albeit rather narrow, issue worth considering in the doctor assisted, suicide cases¹⁶ involves the person suffering pain in the twilight of their life who does not know whether he or she can do it alone. Though not on life support, an individual may come to find that they are in a position where they really want to end the suffering, because they do not want to become a vegetable and cannot end his or her life without some kind of assistance from a doctor. In most cases, the person really just wants to be sure that the law will not be interpreted as preventing him or her from going to a doctor in this terminal situation, and possibly asking for the doctor's assistance in terminating his or her life.

Recently, a Washington law made it a crime to promote a suicide attempt¹⁷, and which the Ninth Circuit ruled unconstitutional on substantive due process grounds.¹⁸ Why? Because your right to terminate your life is a very important right, it goes to the heart of what we are, and it is very important in terms of choosing our own destiny.¹⁹ It is certainly as important as choosing whether to reproduce or not. There could not be anything more fundamental than deciding whether to die, but if it is fundamental, does that make it a fundamental

¹⁶ See *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997); *Vacco v. Quill*, 117 S. Ct. 2293 (1997).

¹⁷ WASH. REV. CODE § 9A.36.060 (1988). The section states in pertinent part: "1). A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide. 2). Promoting a suicide attempt is a class C felony." *Id.*

¹⁸ *Compassion in Dying v. Washington*, 49 F.3d 586, 594 (9th Cir. 1995).

¹⁹ *Id.* at 589 (discussing existence of protected liberty interest).

constitutional right, or if we all consider it fundamental, does that mean that it must be protected by some clause in the constitution?

The Ninth Circuit described all the different instances in which important rights have been recognized by the courts as part of the liberty right of the Fourteenth Amendment.²⁰ We all know that liberty covers more than procedural rights; it covers substantive rights that the state cannot take away from you, regardless of the procedures that they afford.²¹ For example, it covers things like sending your children to school where they can learn German.²² Fundamental also includes sending your child to a religious school,²³ and of course, the abortion cases.²⁴ It is a major decision that we all have to face some time.

According to the Ninth Circuit, it is a major decision in terms of the importance and fundamentality of that decision on some life scale, putting aside the Constitution for a moment.²⁵ Clearly, we cannot imagine anything more important than deciding the time and manner in which we will die. Therefore, if it is so mammoth and important and fundamental on a life basis, the Constitution must recognize it.²⁶ Therefore, the Ninth Circuit struck down that law.

On appeal, the Supreme Court, reversed nine to nothing.²⁷ Chief Justice Rehnquist wrote the majority opinion, with four justices concurring including a succinct concurrence by Justice O'Connor, in which she very carefully, as she has been doing these recent years, qualified her interpretations of the majority

²⁰ *Id.* "[T]his Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Id.* at 499. In addition to rights to marry and have children, "liberty" specially protected by due process also include rights to direct education and upbringing of one's children, marital privacy, contraception use, and bodily integrity. *Id.*

²¹ *Id.* at 1459.

²² *Meyer v. Nebraska*, 262 U.S. 390 (1923).

²³ *Pierce v. Society of Sisters*, 268 U.S. 570 (1925).

²⁴ *See generally* *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

decision. Though she joins the opinion, she interprets the specific meaning of the majority opinion and qualifies her concurrence as being applicable only under certain circumstances.²⁸ Thereafter, Justice O'Connor veers off taking a slightly different tack.²⁹

The majority decision indicated that substantive due process does not mean important, or fundamental rights.³⁰ On the contrary, substantive due process means a right that is deeply rooted in this Nation's history and tradition.³¹ More important, however, it is not a generalized right to die, because the Supreme Court held in *Cruzan v. Director, Missouri Department of Health*,³² that where someone wants to give up a life support system, that decision must be expressed by clear and convincing evidence.³³ The Court did not really say it was a situation analogous to *Cruzan*, despite the fact it has been interpreted that way, but they went up to that point.³⁴

However, there is no generalized right to die.³⁵ If we are asking for a right to be recognized as a fundamental liberty right, it must be narrowly defined in the specific area that we are talking about. In other words, there must be deeply rooted in our history and tradition, a right to doctor assisted suicide,³⁶ and not the generalized right to die. Thus, by defining the right in those narrow terms, a fundamental right, a substantive due process right will be recognized only if the specific right that is being asserted in this case has been recognized and deeply rooted in the Nation's history and tradition.³⁷

Now the minute you phrase it that way, the minute you define the right as only this very narrow right, then of course the game

²⁸ *Id.* at 2275 (O'Connor, J., concurring).

²⁹ *Id.* (O'Connor, J., concurring).

³⁰ *Id.* at 2303.

³¹ *Id.* at 2260.

³² *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261 (1990).

³³ *Id.* at 280.

³⁴ *Id.* at 282.

³⁵ *Glucksberg*, 117 S. Ct. at 2303-10.

³⁶ *Id.* at 2303.

³⁷ *Id.* at 2260. See *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977).

is over. In fact, Chief Justice Rehnquist remarked that approximately forty-seven states have laws against assisted suicide,³⁸ and then he cited to a related case also dealing with the issue, *Rodriguez v. British Columbia*.³⁹ The holding in this Canadian case also represents the norm among western democracies.⁴⁰

We have to put the Netherlands aside because they do recognize by statute a right to doctor assisted suicide.⁴¹ The Netherlands' experience has been debated back and forth, but doctor assisted suicide cannot be deeply rooted in our tradition if forty-seven states have a law against it. It never had a chance to take root if all these states keep on passing laws against it. If we think of substantive due process in those narrow terms and some state came along and said we can't go to the opening night baseball game, or can't go to the Knicks game, which is a deep tradition in our society, then of course you would say well, we have been allowed to go to baseball games all our lives, you can't take that away from us. The point is, that the game was over the minute the question was framed that way. They never had to look at any other difficult issue relating to that matter.

Justice Souter wrote a very long concurrence in which he tells the entire history of substantive due process.⁴² It goes back to natural law⁴³ and it goes back to where substantive due process was born,⁴⁴ and the decision of Justice Bradley in the Slaughter House cases,⁴⁵ and goes over every single case of substantive due process. Everybody recognizes it. So, it is a wonderful teaching tool. His conclusion is that substantive due process can be invoked in a much broader class of cases. His definition, would

³⁸ *Glucksberg*, 117 S. Ct. at 2260.

³⁹ *Id.* at 2263.

⁴⁰ *Rodriguez v. British Columbia (Attorney General)* 107 D.L.R., 4th 342 (Can. 1993).

⁴¹ *Id.* at 404.

⁴² *Glucksberg*, 117 S. Ct. at 2312 (Souter, J., concurring).

⁴³ *Id.* at 2275.

⁴⁴ *Id.*

⁴⁵ *Slaughterhouse Cases*, 83 U.S. (16 Wall) 36 (1873).

take in Justice Harlan's dissent in *Poe v. Ullman*⁴⁶, which is a very broad definition.

Due process has not been reduced to any formula; content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions, it has represented the balance which our Nation built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds upon what has survived is likely to be sound.⁴⁷

Therefore, Justice Harlan would indeed say that it was a continuum, it is not merely a resistance to an arbitrary restraint, it's any resistance to an irrational or arbitrary government position⁴⁸, which of course is much broader than the very narrow way in which Justice Rehnquist decided the case.

There is another concurring opinion which counts, and that is Justice O'Connor's opinion.⁴⁹ Justice O'Connor stated in her

⁴⁶ 367 U.S. 497 (1961) (Harlan, J., dissenting). Justice Harlan defined due process as:

[N]ot the particular enumeration of rights in the first eight Amendment due process, but rather, as was suggested in another context long before the adoption of that Amendment, those concepts which are considered to embrace those rights which are fundamental; which belong to the citizens of all free governments for the purposes of securing which men enter society."

Id. at 541.

⁴⁷ *Id.* at 542.

⁴⁸ *Id.* at 543 (Harlan, J., dissenting). "It is a rationale continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints." *Id.* (citations omitted).

⁴⁹ *Washington v. Glucksberg*, 117 S. Ct. 2302 (1997) (O'Connor, J., concurring). Justice O'Connor, in her concurring opinion states:

There is no need to address the question whether suffering patients have a constitutionally cognizable interest in obtaining relief from the suffering that they may experience in the last days of their lives. There is no dispute that dying patients in Washington and New York can obtain palliative care, even when doing so would hasten their

concurring opinion, along with two other justices joining her, this is a very delphic statement which everybody has been fighting over.⁵⁰ “[R]espondents urge us to address the narrower question whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death.⁵¹ I see no need to reach that question in the context of the facial challenges to the New York and Washington laws at issue here.”⁵² She interprets this as a facial attack on these two laws, therefore, those laws will be upheld if there is any circumstance in which they will satisfy legitimate state interest.⁵³ However, if there was not a facial attack, but a more specific attack by somebody who is in the situation that she described, then she might very well, the Court might very well recognize such an interest.⁵⁴ The narrow question, see how she frames it, “a mentally competent person experienced great suffering,” who is facing imminent death.⁵⁵ Therefore, Justice O'Connor, and at least two other justices, would say we may have to recognize a right of that person to doctor assisted suicide.⁵⁶

I will tell you, I taught a course this summer with Justice Ginsburg in Nice, and so I asked, “What do you want to teach?”

deaths. The difficulty in defining terminal illness and the risk that a dying patient's request for assistance in ending his or her life might not be truly voluntary justifies the prohibition on assisted suicide we uphold here.

Id. at 2303.

⁵⁰ *Id.* (O'Connor, J., concurring).

⁵¹ *Id.* (O'Connor, J., concurring).

⁵² *Id.* (O'Connor, J., concurring). See *Glucksberg*, 117 S. Ct. at 2269. “The Washington statute at issue in this case prohibits ‘aid[ing] another person to attempt suicide,’ . . . and thus, the question before us is whether the ‘liberty’ specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so.” *Id.*

⁵³ *Id.* at 2302. “I agree that the State's interest in protecting those who are not truly competent or facing imminent death, or those whose decisions to hasten death would not be truly voluntary, are sufficiently weighty to justify a prohibition against physician-assisted suicide.” *Id.*

⁵⁴ *Id.* (O'Connor, J., concurring).

⁵⁵ *Id.* (O'Connor, J., concurring).

⁵⁶ *Id.* (O'Connor, J., concurring).

She said, "I want to spend the whole time on the *Glucksberg* case."⁵⁷ We spent two weeks on this case. I said, "I thought it's all over." She replied, "Oh no, it is just beginning." She thought it was just beginning, and what we did, it was an interesting exercise, what we did was we took a specific person and we analyzed what if a specific person, not a facial attack, but a specific person was urging the right to doctor assisted suicide, and the example we took was Mrs. Rodriguez, a Canadian case. Mrs. Rodriguez is described as follows:

The appellant suffers from amyotrophiclateral sclerosis. Her condition is rapidly deteriorating and she will soon lose the ability to swallow, speak, walk and move her body without assistance. Thereafter, she will lose the capacity to breathe without a respirator, eat without a gastronomie and will eventually be confined to her bed. Her life expectancy is two months. The Appellant does not wish her to die so long as she has the capacity to enjoy life, but wishes that a qualified physician be allowed to set up technological means by which she might, when she is no longer able to enjoy life, by her own hand at the time of her choosing, end her life.⁵⁸

Now that is a little more specific. That is a much more compelling case. Justice Ginsburg thought that was an open issue which was not foreclosed by the *Glucksberg* case. Believe me she had students from the United States and abroad throwing that one around. I can assure you it is a much more difficult issue. The issue really is whether this law is constitutional as applied to a person in that condition. As applied, again this is Justice O'Connor, somebody who was mentally competent, experiencing great suffering, facing imminent death, but concerned that he or she may not be in a position to end things by themselves. They want some help. However, that is a different situation. There may certainly be some circumstances where someone in that position may bring a case and attack the law saying forget the

⁵⁷ *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

⁵⁸ *Rodriguez v. British Columbia (Attorney General)* 107 D.L.R., 4th at 342, 346 (Can. 1993).

facial attack. I am actually in this situation and I want to be sure I have a doctor who will help me. The doctor will not help me because he's concerned about the law against doctor assisted suicide. I want in my case, just in my case, I want this law struck down or interpreted so that the doctor will be able to help me. That is not such an easy issue.

Now the second case, out of New York, *Vacco v. Quill*,⁵⁹ concerned equal protection.⁶⁰ New York law prohibits doctor assisted suicide and the Second Circuit said, listen, people may choose to die and the law recognizes their right to die under other circumstances.⁶¹ There was a time when you were offending God and everybody else if you committed suicide. Therefore, if you just hurt yourself, your attempt is a felony, namely your own suicide, and they hung you for it, something, whatever they did in those days.

The Court recognizes that suicide is no longer a crime.⁶² Refusing medical treatment, not putting in the life support system, not allowing you to go on life support, you can choose to do that.⁶³ States recognize that. Therefore you have the right to refuse medical treatment. You go on life support, you are on life support, now you want to take it off. You have the right to do

⁵⁹ *Vacco v. Quill*, 117 S. Ct. 2293 (1997).

⁶⁰ *Id.* at 2296.

⁶¹ *Quill v. Vacco*, 80 F.3d 716, 731 (2d Cir., 1996). The Second Circuit held that the New York statutes that criminalize assisted suicide "[v]iolate the Equal Protection Clause because, to the extent that they prohibit as physician from prescribing medications to be self-administered by a mentally competent, terminally-ill person in the final stages of his terminal illness, they are not rationally related to any legitimate state interest." *Id.* at 731. "Those in the final stages of terminal illness who are on life-support systems are allowed to hasten their deaths by directing the removal of such systems." *Id.* at 729.

⁶² *Id.* at 724. Neither suicide nor attempted suicide is considered a crime in the United States anymore, although 32 states, including New York, are continuing to consider assisted suicide an offense. *Id.*

⁶³ *Id.* at 727. The right to refuse medical treatment has been recognized in New York for some time. *Id.* Judge Cardozo wrote that under New York law, "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body." *Id.* In 1981, it was held by the New York Court of Appeals that this has now extended to the withdrawal of a life support system. *Id.*

that. You have the right to refuse life support, you have the right to remove life support. In addition, you have the right to palliative care at the very end, that's to say the person suffering great pain, and the doctors give you a very large dose of morphine, and that's enough to kill them.⁶⁴ That certainly hastens the end. The court recognizes that. Now, how different is the right to doctor assisted suicide, that is to say it's not palliative care, not extremist, but I'm suffering, it is not life support system. In other words, my pain and suffering will be continued for some period of time. However, I'm not on life support and I can't do it myself. I need some help. If we allow a person in these four other situations to end their life, straight suicide, reject life support, turn off life support, get palliative care at the very end. What's the difference. It is just part of the whole ball of wax.

If you look at this situation everyone has an interest in this one. So there is a very interesting approach by Ron Dworkin. He has written a book about euthanasia and suicide. He has written a series of articles in the New York Review of Books, before the case, after the case. In the latest issue, there is a debate between him and other scholars about the case. Dworkin is a great teacher at New York University, a philosopher. He has taken a great interest in this case, and he and some other philosophers, never mind the lawyer, philosophers, wrote a brief, the thrust of which was that morally you cannot distinguish these situations, you cannot distinguish between suicide, refusing life support, ending life support, palliative care and getting doctor assisted suicide in order to avoid great pain and suffering, even though you are not on life support.

Morally you have that very situation and that is what the Second Circuit said.⁶⁵ Therefore it is an equal protection violation, because like people in similar situations are not being treated the same. That case goes up to the Supreme Court, and once again

⁶⁴ *Id.* at 729. "Withdrawal of life support requires physicians or those acting at their direction physically to remove equipment and, often, to administer palliative drugs which may themselves contribute to death." *Id.*

⁶⁵ *See Quill v. Vacco*, 80 F.3d 716 (1996).

nine to nothing, they reverse.⁶⁶ Now they have to distinguish these other cases.

What is the difference between refusing medical treatment or ending life support on one hand and doctor assisted suicide on the other? Justice Rehnquist says, you have the right to refuse medical treatment, it's protected by the common law rule on battery.⁶⁷ If a doctor put an instrument and treated you when you say don't treat me, do not put life support on, no, I am going to do it, I will sue you for battery. Here, we have this giant important issue, philosophical, constitutional issue, and I really don't think it's going to be decided on whether it meets the common law definition of battery. That is the way the decision started. He then says there is a difference between sustaining life and ending it, and if the patient wishes to cease doing a useless, futile and degrading thing, such as staying on life support, that is different than ending. Life support looks awful and it is useless, futile and degrading, therefore, that is different then ending your life with a dignified manner, just taking a pill or getting a different kind of treatment.

Again, the problem in *Vacco* is that the Court had to distinguish between what is permissible and what is not permissible. Because if they are really all part of the same ball of wax, which is what the philosophers said in the Amicus brief, that is a little hard to say these four things are okay, but this fifth thing is not okay. Another distinction Chief Justice Rehnquist makes in that case, that in the palliative case, where you give morphine in the very end, the doctor intends to ease pain and not end life.⁶⁸ I do not know if there are any doctors here who will tell us, are you aware that giving this degree of morphine will not only ease the pain, but most likely will end the life. I think that doctors who honestly tell you that they know what they are doing and they do it a fair amount of time. The final distinction the Chief Justice

⁶⁶ *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

⁶⁷ *Id.* at 2260 (stating that the common law rule on battery also prohibits forced medication of individuals).

⁶⁸ *Vacco v. Quill*, 117 S. Ct. 2293, 2298-99 (1997).

makes, there is a difference between letting a patient die and making that patient die.

I don't know whether any of these distinctions really are going to make it. In *Washington v. Glucksberg*,⁶⁹ the fact is they came up with some other state interests and there are at least five state interests that we have to be concerned about.⁷⁰ One of them is simply the state interest of preserving human life.⁷¹ We simply must make it difficult under any circumstances to end human life; preserving human life is a very important state interest and you have to show very good reason if you are going to undermine that.

Secondly, those who request help in committing suicide are often depressed, it will go away tomorrow.⁷² You got her in a bad moment. Tomorrow she may feel differently. How do you know that this is a really fundamental decision about your destiny or whether I am just feeling terrible today. How do you know if it's a depressed motivating decision or whether it's a real life motivating decision.

Third, you want to protect the integrity and ethics of the medical profession.⁷³ You do not want doctors thinking -- am I going to save this person or help them commit suicide? Some of the studies in the Netherlands suggested that doctors are cutting corners or maybe they are not cutting corners.

There were two studies in the Journal of New England Medicine about the Netherlands studies.⁷⁴ There has been a huge

⁶⁹ *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

⁷⁰ *Id.* at 2271-72.

⁷¹ *Id.* at 2272 (citing *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 282 (1990)).

⁷² *Glucksberg*, 117 S. Ct. at 2272-73.

⁷³ *Id.* at 2272.

⁷⁴ Paul J. van der Maas, *Euthanasia, Physician-Assisted Suicide, and Other Medical Practices Involving the End of Life in the Netherlands, 1990-1995*, 335 NEW ENG. J. MED. 1699-705 (1996). Gerrit van der Wal, ET AL., *Evaluation of the Notification Procedure for Physician-Assisted Death in the Netherlands*, 335 NEW ENG. J. MED. 1706-11 (1996). The studies examined the number of physician-assisted suicides in the Netherlands. Although technically illegal, physician-assisted suicides still occur in the Netherlands, however, they are very rarely prosecuted. Van Der Wal, at 1706-

controversy about what is happening in the Netherlands, where it is permissible. Are doctors in the Netherlands cutting corners because, for example, there's a family that wants to get rid of the financial burden, it's costing them a lot of money? So they say to the doctor this is costing a lot of money, let us just get rid of this person. There is at least some suggestion in the Netherlands they are not following all the procedures, and you want the doctors on the side of preserving life whenever they can and not giving them an opportunity not to do it.

The fourth reason, which is related to this whole business about cost, you want to protect vulnerable groups whose medical situations are a financial drain to their families.⁷⁵ If there was a generalized right to suicide, is the family going to encourage someone, just end it. Again, there is some suggestion in the Netherlands study that this might be a problem.

The last reason is that there is a slippery slope to euthanasia,⁷⁶ at what point are we going to open the doors. Remember what Justice O'Connor said, competent person, great suffering, imminent death.⁷⁷ Where do you draw the line above that. These are not very easy issues.

When we were teaching this course in Nice we actually argued a hypothetical case. I was a justice of the Supreme Court, that is as close as I will ever get, with Ruth Ginsburg, being the two justices hearing the argument. We heard arguments from students. We used the *Rodriguez* case, and Justice Ginsburg asked me, well, what do you think? So I had to decide the case.

11. The studies are an empirical examination of the government's required notification procedure of physician-assisted suicides. *Id.*

⁷⁵ *Glucksberg*, 117 S. Ct. at 2273.

⁷⁶ *Id.* at 2274.

⁷⁷ *Washington v. Glucksberg*, 117 S. Ct. 2302, 2303 (1997) (O'Connor, J., concurring). In her concurrence Justice O'Connor acknowledges that there is no generalized right to commit suicide, but reserves opinion as to whether a mentally competent individual, experiencing great suffering and facing imminent death has a cognizable right to commit suicide. *Id.* at 2303 (O'Connor, J., concurring).

I must say there's a very good book I read this summer⁷⁸, Maxwell Perkins, who was a great editor when he was around, and Thomas Wolfe was one of his authors. Thomas Wolfe died after a long illness, and Perkins spoke at his funeral, and what he said about Wolfe applies here as well. You have to think of the great line from King Lear, "He hates him that would upon the rack of this rough world that would stretch him out longer."⁷⁹ There are people who are stretched out on a very tough rack. Somehow, I do not know quite how, the Court's Constitution has to give a little. I think we have not seen the last of this question. Thank you very much.

⁷⁸ A. SCOTT BERG, MAX PERKINS, EDITOR OF GENIUS 354 (1978).

⁷⁹ KING LEAR, Act V, Scene III.

