OBERGEFELL AND THE FUTURE OF SUBSTANTIVE DUE PROCESS[†]

Richard S. Myers[††]

INTRODUCTION[†††]

Obergefell v. Hodges[1] is an enormously important decision that will have profound effects on marriage and religious liberty in the United States. Those issues will be explored in great detail by many scholars, including several of the speakers at this symposium.[2] This article will focus on a different issue. The principal basis for the Court's holding that the traditional laws defining marriage—as the union between one man and one woman—are unconstitutional was the doctrine of substantive due process.[3] That came as a surprise to some observers because much of the emphasis in the challenges to the constitutionality of traditional marriage laws was on "equality themes."[4]

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† This article is an expanded version of the following talks: Richard S. Myers, Moderator, *Address at the Ave Maria Law Review*; *The Marriage and Family Research Project of BYU Law School*; and, *The BYU Journal of Public Law Symposium*: *The Implications of* Obergefell v. Hodges *for Families, Faith, and the Future* (Oct. 12, 2015) [hereinafter BYU Symposium].

†† Professor of Law, Ave Maria School of Law.

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

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

2. BYU Symposium, *supra* note †.

3. There are several components to substantive due process. *See* Myers, *End Substantive Due Process?*, *supra* note †††, at 557 n.1. In this article, substantive due process refers to the court's use of the doctrine to "hold[] unconstitutional state statutes that violate a 'liberty' interest the Court believes is protected by the clause, regardless of the manner in which the deprivation occurs." *Id.* This use of the doctrine "affords constitutional protection to individual rights claims without a clear textual warrant. . . ." *Id.* at 557.

4. *See* Myers, *Re-reading* Roe, *supra* note †††, at 1044–45. Interestingly, the Department of Justice Justice relied on equality arguments and did not address the substantive due process issue in its *Obergefell* amicus brief filed in favor of the plaintiffs. Brief for United States as Amicus Curiae Supporting Petitioners at 13–36, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, -562, -571, and -574), http://www.justice.gov/sites/default/files/crt/legacy/2015/03/06/obergefellhodgesbrief.pdf. Chief Justice Roberts's dissent noted that "[t]he Solicitor General of the United States . . . expressly disowned . . . [the

The Court's reliance on substantive due process revived a doctrine that had fallen into disfavor and opens the prospect that the doctrine might be used in other areas. For example, there has been much focus on whether *Obergefell's* due process holding might be extended to protect polygamy.[5] The most important substantive due process issue in the coming years, however, is likely to be whether *Obergefell* portends a Supreme Court ruling that would overturn *Washington v. Glucksberg*.[6] *Obergefell* does seem to make it likely that the Court will invalidate laws banning assisted suicide, and it is that issue this article will address.

I. SUBSTANTIVE DUE PROCESS

A. *A Brief History of Substantive Due Process*

The doctrine of substantive due process has long been controversial. This is readily apparent by simply mentioning a few of the most prominent decisions invoking the doctrine—*Dred Scott*,[7] *Lochner*,[8] and *Roe v. Wade*.[9] This is not the place for a full treatment of the doctrine.[10] This article will largely focus on the modern era of substantive due process.

During the *Lochner* era, the Court used the due process clause in a conservative way.[11] The Court's opinions reflected support for a classical liberal view of individual freedom.[12] This persisted for decades in the face of

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due process argument] before this Court." *Obergefell*, 135 S. Ct. at 2615 (Roberts, C.J., dissenting) (citing Transcript of Oral Argument on Question 1, at 38–39).

5. *See, e.g.*, William Baude, Opinion, *Is Polygamy Next?*, N.Y. TIMES, (July 21, 2015), http://www.nytimes.com/2015/07/21/opinion/is-polygamy-next.html; Fredrik DeBoer, *It's Time to Legalize Polygamy*, POLITICO (June 26, 2015), http://www.politico.com/magazine/story/2015/06/gay-marriage-decision-polygamy-119469#ixzz3eBgtvUuQ; Robert P. George, *Is Polyamory Next?*, AM. INTEREST (Aug. 25, 2015), http://www.the-american-interest.com/2015/08/25/is-polyamory-next. *Obergefell* has been cited in cases challenging state bans on polygamy. *See* Jacob Gershman, *'Sister Wives' Polygamists Cite Gay Marriage Ruling in Court Fights*, WALL ST. J.: L. BLOG (Aug. 28, 2015, 12:52 PM), http://blogs.wsj.com/law/2015/08/28/sister-wives-polygamists-cite-gay-marriage-ruling-in-court-fights/ ("In a pair of federal lawsuits, reality television stars are pushing to legalize polygamy.").

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

7. Scott v. Sandford, 60 U.S. 393 (1857).

8. Lochner v. New York, 198 U.S. 45 (1905).

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

10. For more complete discussions of substantive due process, see Myers, *End Substantive Due Process?*, *supra* note †††; Myers, *Pope John*, *supra* note †††; Myers, *Re-reading* Roe, *supra* note †††, at 1027–29. *See also* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1721–40 (2012); Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63 (2006).

11. *Lochner*, *supra* note 8, at 53–54 (finding that a New York law prohibiting bakery employees to work more than sixty hours a week, or ten hours a day, was unconstitutional because it interfered with the liberty of contract protected by the due process clause).

12. *See* DAVID E. BERNSTEIN, *Introduction*, *in* REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 1, 3–4 (2011) (the liberty of contract protected by *Lochner* was grounded in the venerable natural rights tradition); Randy E. Barnett, *Justice Kennedy's Libertarian*

increasing efforts to expand the role of government regulation in many areas. The *Lochner* era ended at the time of the New Deal.[13]

By 1963, the Supreme Court had rejected any substantive review of legislation under the due process clause. In *Ferguson v. Skrupa*,[14] the Court stated:

> The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, *Burns*, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. . . . It is now settled that States "have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or some valid federal law."[15]

In 1965, however, the Court revived the doctrine in *Griswold v. Connecticut*,[16] although the Court did not candidly rely on the discredited doctrine of substantive due process.[17] In 1973, in *Roe v. Wade*,[18] the Court did forthrightly rely on the doctrine of substantive due process in effectively striking down the abortion laws of every state in the Union.[19] The modern era

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Revolution: Lawrence v. Texas, 2002–2003 CATO SUP. CT. REV. 21, 23 (2003) (There is a "continuity between the principles of the founding and what the Progressive Era Supreme Court was trying to do in circumscribing state power via the Fourteenth Amendment.").

13. In *West Coast Hotel v. Parrish*, 300 U.S. 379, 381–83 (1937), the Court upheld the constitutionality of a Washington law setting the minimum wages for women and minors, effectively ending the Lochner era. *See* Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215, 216–17 (1987).

14. *See* Ferguson v. Skrupa, 372 U.S. 726 (1963).

15. *Id.* at 730–31 (quoting Lincoln Fed. Labor Union v. Nw. Iron & Metal Co., 335 U.S. 525, 536 (1949)).

16. Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

17. *See* Myers, *Re-reading* Roe, *supra* note ††††, at 1028. In his concurring opinion in *Roe v. Wade*, Justice Stewart stated:

> In view of what had been so recently stated in *Skrupa*, the Court's opinion in *Griswold* understandably did its best to avoid reliance on the Due Process Clause of the Fourteenth Amendment as the ground for decision. Yet, the Connecticut law did not violate any provision of the Bill of Rights, nor any other specific provision of the Constitution. So it was clear to me then, and is equally clear to me now, that the *Griswold* decision can be rationally understood only as a holding that the Connecticut statue substantively invaded the "liberty" that is protected by the Due Process Clause of the Fourteenth Amendment. As so understood, *Griswold* stands as one in a long line of pre-*Skrupa* cases decided under the doctrine of substantive due process, and I now accept it as such.

Roe v. Wade, 410 U.S. 113, 167–68 (1973) (Stewart, J., concurring) (footnotes omitted).

18. *Roe*, 410 U.S. at 113.

19. In *Roe*, the Court stated:

was not characterized by the traditional conservative orientation of the *Lochner* era. The Court seemed keen in *Roe v. Wade*, for example, to get on the right side of history by siding with what it viewed as emerging social trends.[20]

But the modern era of substantive due process moved in fits and starts. For example, in 1986, in *Bowers v. Hardwick*,[21] the Court rejected a constitutional challenge to a Georgia law banning homosexual sodomy. The Court's approach to substantive due process in *Bowers* seemed to conflict with the Court's approach in its abortion cases.[22] The Court, though, rejected arguments that it ought to overrule *Roe* and in 1992, in *Planned Parenthood of Southern Pennsylvania v. Casey*,[23] the joint opinion reaffirmed *Roe v. Wade* and described substantive due process in sweeping terms. In *Casey*, the joint opinion (in)famously stated:

> [M]atters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.[24]

Casey did not, however, lead to an expansion of the scope of substantive due process.[25] After *Casey*, a number of lower courts did read *Casey's*

> The right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

Id. at 153. As previously noted, "[t]he Court's acceptance of the doctrine of substantive due process in *Roe* . . . was almost casual." Myers, *Re-reading* Roe, *supra* note †††, at 1028. Justice Rehnquist's dissent made it clear that the Court's holding invalidated the abortion laws of every state. Roe, 410 U.S. at 171–73 (Rehnquist, J., dissenting).

20. *See* CLARKE D. FORSYTHE, ABUSE OF DISCRETION: THE INSIDE STORY OF *ROE V. WADE* 290 (2013) ("The conventional wisdom is that the Court 'led public opinion' in 1973—that the country was moving inescapably toward legalizing abortion, and that the Court was just ahead of public opinion."). As Forsythe makes clear, that was not an accurate reading of the situation. *Id.* at 289–309 (discussing abortion and public opinion).

21. Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

22. *See* Myers, *End Substantive Due Process?*, *supra* note †††, at 595–96; *see also* Conkle, *supra* note 13, at 224 ("*Bowers* cannot be reconciled with the Court's prior decisions, including especially the Court's decision in *Roe v. Wade*.").

23. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992). For commentary on *Casey*, *see, e.g.*, Richard S. Myers, *The Twentieth Anniversary of* Planned Parenthood v. Casey, in ABSTRACTS FOR UNIVERSITY FACULTY FOR LIFE CONFERENCE 11–12 (2012) [hereinafter Myers, *Twentieth*], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2150241. *See also* Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995 (2003).

24. *Casey*, 505 U.S. at 851.

25. *See* Myers, *Twentieth*, *supra* note 23, at 11.

"mystery passage" to support the view that substantive due process protected the "'right to die.'"[26] A number of years ago, this author described these lower court decisions as follows:

> These opinions ignored the opposition to assisted suicide in our history and tradition and appealed to *Casey's* abstract rhetoric. These opinions regarded the broad language as "highly instructive" and "almost prescriptive" in resolving the assisted suicide issue. According to this view, "the right to die with dignity" accords with American values of self-determination and privacy regarding personal decisions.[27]

But when the issue reached the Supreme Court in 1997 in *Washington v. Glucksberg* and in *Vacco v. Quill*,[28] the Court rejected the argument that there was a fundamental right to assisted suicide.[29] The Court explained the need for caution in considering whether to expand the category of fundamental rights, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court."[30] The Court emphasized two key points:

> First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," . . . and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." . . . Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest.[31]

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26. *See, e.g.*, Compassion in Dying v. Washington 79 F.3d 790, 816 (9th Cir. 1996) (en banc) (quoting Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 277 (1990)), *rev'd sub nom*. Washington v. Glucksberg, 521 U.S. 702, 708–09 (1997). *See also* Myers, *Pope John*, *supra* note †††, at 69–70 (briefly noting lower court opinions relying on *Casey*'s expansive approach to substantive due process).

27. *See* Richard S. Myers, *Physician-Assisted Suicide and Euthanasia: A Current Legal Perspective*, in LIFE AND LEARNING XI: THE PROCEEDINGS OF THE ELEVENTH UNIVERSITY FACULTY FOR LIFE CONFERENCE 3, 4–5 [hereinafter Myers, *Physician-Assisted Suicide*] (Joseph W. Koterski, ed., 2002) (footnotes omitted). Available at SSRN: http://ssrn.com/abstract=2093660.

28. Vacco v. Quill, 521 U.S. 793 (1997).

29. In *Glucksberg*, the Court stated:

> The history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it. That being the case, our decisions lead us to conclude that the asserted "right" to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause.

Glucksberg, 521 U.S. at 728.

30. *Id.* at 720.

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

The *Glucksberg* Court almost completely ignored *Casey's* expansive approach and adopted a narrow, historically-grounded approach to substantive due process.[32]

In 2003, however, the Court moved in another direction in *Lawrence v. Texas*.[33] In *Lawrence*, the Court invalidated a Texas law proscribing "deviate sexual intercourse" between persons of the same sex.[34] In so doing, the Court revived the broader, more expansive approach to identifying fundamental rights. The Court revived the "mystery passage" from *Casey* and extolled the virtues of moral autonomy.[35] The Court stated, "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[36] The Court rejected the idea that Texas could condemn homosexual conduct as immoral. As the Court stated, "[t]he issue is whether the majority may use the power of the State to enforce these [moral] views on the whole society through operation of the criminal law. 'Our obligation is to define the liberty of all, not to mandate our own moral code.'"[37] This effort to impose morality was particularly troublesome because the Court viewed Texas as trying "to define the meaning of the relationship [between two consenting adults] or to set its boundaries absent injury to a person or abuse of an institution the law protects."[38]

Justice Kennedy's *Lawrence* opinion made it clear that the Court was not trying to do a textual or historical analysis. The Court did not as much as cite *Glucksberg*, which seemed to set forth the governing analytical framework for substantive due process cases.[39] The Court argued, "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."[40] The key for the *Lawrence* Court was its own assessment of contemporary trends and its own understanding about the nature of liberty. The Court emphasized that its analysis of recent history demonstrated "an emerging awareness that liberty gives substantial protection

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32. *See* Myers, *Re-reading* Roe, *supra* note ††††, at 1043.

33. Lawrence v. Texas, 539 U.S. 558 (2003).

34. *Id.* at 563 (quotation omitted) (describing Texas statute).

35. *Id.* at 573–74.

36. *Id.* at 562.

37. *Id.* at 571 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992)).

38. *Lawrence*, 539 U.S at 567.

39. *See* Nelson Lund & John O. McGinnis, *The Boundaries of Liberty After* Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1579 (2004).

> Without so much as citing *Glucksberg*, *Lawrence* abandons both of its core requirements: that a fundamental right be carefully described and that there be objective evidence that the right is deeply rooted in our nation's history and tradition. The rejection of the *Glucksberg* test is not only unacknowledged and unexplained, but it is a total rejection.

Id.

40. *Lawrence*, 539 U.S. at 572 (alteration in original) (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[41] The Court closed with this passage:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[42]

Despite the Court's ruling in *Lawrence v. Texas*, the *Glucksberg* approach seemed to remain the dominant approach to substantive due process.[43] *Lawrence* seemed to threaten the constitutionality "of all morals legislation," as Justice Scalia noted in his *Lawrence* dissent.[44] But that is not what happened in the lower courts. Certain judges did try to apply *Lawrence* in new contexts.[45] Most lower court judges, however, were "more cautious and seem[ed] inclined to let the Supreme Court take responsibility for pushing the underlying logic of *Casey* and *Lawrence* to its limits."[46] Some of these lower court decisions read as if *Lawrence* had never been decided.[47] Others acknowledge *Lawrence* but read the opinion narrowly because of the *Lawrence* Court's failure to follow conventional methods of doctrinal analysis.[48] Professor Calabresi noted several years ago that *Lawrence* "is itself an outlier that neither the Supreme

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41. *Lawrence*, 539 U.S. at 578–79.

42. *Id.* at 578–79.

43. *See* Myers, *Re-reading* Roe, *supra* note ***†††***, at 1043–44. *See also* Richard S. Myers, *The Implications of Justice Kennedy's Opinion in* United States v. Windsor, 6 ELON L. REV. 323, 329–31 (2014) [hereinafter Myers, *Justice Kennedy's Opinion*]; Myers, *Pope John, supra* note ***†††***, at 75; Kenji Yoshino, Comment, *The Supreme Court 2014 Term: A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147 (2015) (footnotes omitted). In particular, Yoshino noted:

> The *Glucksberg* restrictions—the restriction based on tradition, the restriction based on specificity, and, less formally, the restriction based on the negative nature of the liberty exercised—placed severe constraints on substantive due process jurisprudence. *Lawrence* clearly affected these constraints. Yet even after *Lawrence*, *Glucksberg* was still treated as good law, surfacing in the briefs in *Obergefell* as controlling authority.

Id. at 162.

44. *See* Lawrence, 539 U.S. at 586, 599 (Scalia, J., dissenting).

45. *See* Myers, *Pope John*, *supra* note ***†††***, at 76.

46. *Id. See also* J. Kelly Strader, Lawrence*'s Criminal Law*, 16 BERKELEY J. CRIM. L. 41, 42 (2011) (footnotes omitted) ("Despite *Lawrence's* purported landmark status and the vast amount of commentary that the decision has produced, the case has had remarkably little impact on substantive criminal law as applied by lower federal courts and state courts.").

47. *See* Myers, *Pope John*, *supra* note ***†††***, at 75.

48. *See* Myers, *Justice Kennedy's Opinion*, *supra* note 43, at 330–31.

Court nor the lower federal and state courts are following."[49] Interestingly, a recent Ninth Circuit opinion rejected a substantive due process argument by relying on *Glucksberg*. The court did not even cite *Lawrence* or *Obergefell*.[50]

B. *Obergefell v. Hodges and Substantive Due Process*

Obergefell changes all of this. In *Obergefell*, the Supreme Court found, as it framed the issue, that "the Fourteenth Amendment requires a State to license a marriage between two people of the same sex."[51] The Court's holding principally relied on the doctrine of substantive due process.[52] The Court explained that in applying this doctrine it would "exercise reasoned judgment in identifying interests of the person so fundamental that the State accord them its respect."[53] In applying "reasoned judgment," the Court stated that "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries. . . . That method respects our history and learns from it without allowing the past alone to rule the present."[54] Echoing *Lawrence*, the Court stated:

> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new

49. Steven G. Calabresi, *Substantive Due Process After* Gonzales v. Carhart, 106 MICH. L. REV. 1517, 1541 (2008).

50. *See* Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433 (2016). *Stormans* involved a challenge to a Washington law that forces pharmacists to deliver emergency contraceptives, even when the pharmacists have religious objections to such a mandate. The court rejected free exercise and equal protection arguments. In addition, the court also rejected a substantive due process challenge to the Washington law. The plaintiffs argued that they had substantive due process, stating a "'right to refrain from taking human life.'" *Id.* at 1072, 1082, 1085. Plaintiffs relied in part on arguments made in a law review article by Professor Mark Rienzi which made a persuasive case for the asserted right:

> Under any approach to substantive due process—history and tradition, recent trends and emerging consensus, liberty and self-definition—the constitutional right not to kill qualifies for protection. In fact, under each test, the right not to kill qualifies as well or better than other rights the Court has recognized over time.

See Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 EMORY L.J. 121, 176–77 (2012). Nevertheless, applying *Glucksberg's* analysis, the Ninth Circuit, which is not known as a bastion of judicial restraint, declined to find a new constitutional right. *Stormans,* 794 F.3d at 1088.

51. Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015).

52. *Id.* at 2605. The Court relied on both the due process clause and the equal protection clause but it is liberty/autonomy that is doing most of the work. *See* Yoshino, *supra* note 43, at 148.

53. Obergefell, 135 S.Ct. at 2598.

54. *Id.* (citation omitted).

> insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.[55]

The Court tried to situate its holding as following from earlier cases that had recognized a fundamental right to marry.[56] The Court though seemed to realize that something new was at stake, and ultimately concluded that the right to marry should be extended to same-sex couples. The Court's principal reason for so doing was that this was necessary to respect individual autonomy and self-determination and choice,[57] at least when the conduct involved "the rights of two consenting adults whose marriage[] would pose no risk of harm to themselves or third parties."[58] The Court admitted that marriage had been traditionally understood to involve a union of a man and a woman: "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."[59] In reaching this conclusion, the Court did not rely on national or international trends, as it did in *Lawrence*. The Court did not rely on the "careful description" analysis from *Glucksberg*. The Court stated, "Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy."[60] The *Obergefell* Court also abandoned the other key feature of *Glucksberg*—its emphasis on history and tradition. Fundamental rights, the Court explained, are not limited to those protected by history and tradition. "They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."[61]

The *Obergefell* dissenters complained, with some justification, "that the majority's position requires it to effectively overrule *Glucksberg*, the leading modern case setting the bounds of substantive due process."[62] Chief Justice Roberts's dissenting opinion noted that the Court's "freewheeling notion of individual autonomy echoes nothing so much as [*Lochner*'s protection for] 'the general right of an individual to be *free in his person* and in his power to contract in relation to his own labor.'"[63] Moreover, the dissent noted, "[w]hatever force that belief may have as a matter of moral philosophy, it has

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55. *Id.*
56. *Id.*
57. *Id.* at 2599.
58. *Id.* at 2607.
59. *Id.* at 2602.
60. *Id.*
61. *Id.*
62. *Id.* at 2621 (Roberts, C.J., dissenting).
63. *Id.* (Roberts, C.J., dissenting) (emphasis in original) (quoting Lochner v. New York, 198 U.S. 45, 58 (1905)).

no more basis in the Constitution than did the naked policy preferences adopted in *Lochner*."[64]

The message of *Obergefell*, beyond its immediate context, is not terribly clear. In many instances, opinions that are long on attempts at soaring rhetoric and short on standard legal analysis are not influential. That seems to be true of *Lawrence*.[65] Beyond its immediate context of adult sexual activity, the decision was not that influential in the lower courts.[66] The same may be true for *Obergefell*.

The decision may be limited to gay rights issues. Justice Kennedy, who is often the swing vote on the Court, has been a strong advocate of gay rights.[67] He wrote the key opinions in *Romer v. Evans*,[68] *Lawrence v. Texas*,[69] *United States v. Windsor*,[70] and *Obergefell v. Hodges*.[71] All four opinions are doctrinally obscure but clear about their support for gay rights. These rulings have led commentators to refer to Justice Kennedy as the "first gay justice"[72] and as a "gay rights icon."[73] It may be that Justice Kennedy's opinion in *Obergefell* will be grouped with *Romer*, *Lawrence*, and *Windsor* as a gay rights case that will not be extended beyond that context.

That will not likely happen—although, of course, much will depend on the composition of the Court over the next decade or so. Justice Kennedy's opinion in *Obergefell* seems designed to have more enduring significance. Justice Kennedy's opinion in *Lawrence* was perhaps more of a failure in terms of judicial craft. The *Lawrence* Court overruled *Bowers* but the Court did not make it clear whether the case involved a fundamental right or what level of scrutiny applied. Moreover, the *Lawrence* Court did not even cite *Glucksberg* or deal explicitly with *Glucksberg*'s approach to substantive due process.

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64. *Id.* (Roberts, C.J., dissenting).

65. *See* Myers, *Justice Kennedy's Opinion*, *supra* note 43, at 330–31.

66. *Id.* at 330.

67. *See* Lawrence C. Levine, *Justice Kennedy's "Gay Agenda":* Romer*,* Lawrence*, and the Struggle for Marriage Equality*, 44 MCGEORGE L. REV. 1 (2013) (footnote omitted) ("Rightfully, Justice Kennedy has been lauded for his thoughtful and sensitive gay-friendly jurisprudence."). *See also* Ruthann Robson, *Justice Ginsburg's* Obergefell v. Hodges, 84 UMKC L. REV. 837 (commenting on Justice Kennedy's support for gay rights).

68. Romer v. Evans, 517 U.S. 620, 623 (1996).

69. Lawrence v. Texas, 539 U.S. 558, 562 (2003).

70. United States v. Windsor, 133 S. Ct. 2675, 2681 (2013).

71. *Obergefell*, 135 S. Ct. at 2603.

72. *See*, e.g., Bill Mears, *Is Anthony Kennedy 'The First Gay Justice'?*, CNN POLITICS (June 28, 2013), http://www.cnn.com/2013/06/27/politics/scotus-kennedy (quoting "'Michael Dorf, a law professor at Cornell University and a former Kennedy law clerk'").

73. *See* Sarah Wheaton, *Justice Kennedy Hailed as Gay Rights Icon*, POLITICO (June 26, 2015), http://www.politico.com/story/2015/06/anthony-kennedy-gay-marriage-supreme-court-icon-119471.

Obergefell is more candid about its disagreement with *Glucksberg*'s approach,[74] although there is some ambiguity about *Obergefell*'s meaning.

Obergefell seems to be an effort to cement the Court's broad approach to substantive due process. The Court's analysis is unconstrained by history or a careful description of the asserted right or even an assessment of emerging trends. The Court's focus is more on its own reflections on the nature of liberty and its own discernment of new insights and societal understandings about "what freedom is and must become."[75]

The Court's understanding of "what freedom is and must become" is an old, and much discussed view. The Court's understanding is an endorsement of the "autonomy of self"[76] that Justice Kennedy celebrated in *Lawrence* and of the "mystery passage" of *Casey*.[77] The Court seems to have concluded that, although "[t]he [Fourteenth] Amendment Constitution does not enact Mr. Herbert Spencer's Social Statics,"[78] it does enact John Stuart Mill's On Liberty.[79] The constraints on autonomy seem limited to the harm principle.[80]

C. *Implications*

It is not clear where *Obergefell* will lead. There has been much discussion about the implications of the decision for the prohibition on polygamy.[81] Chief Justice Roberts addressed this point in some detail in his dissent. He noted that "[i]t is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage."[82] It is

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74. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2621 (2015) (Roberts, C.J. dissenting) ("[T]he majority's position requires it to effectively overrule *Glucksberg*, the leading modern case setting the bounds of substantive due process."); Professor Yoshino concluded:

> The *Obergefell* methodology is strikingly different from the *Glucksberg* methodology. . . . Indeed, Justice Kennedy's repeated confrontations with the *Glucksberg* restrictions suggested that he chose to take this opportunity to fashion a fully realized vision of how liberty analysis should proceed. At some level, he was finally forced to write this essay on substantive due process.

Yoshino, *supra* note 43, at 169.

75. *Obergefell*, 135 S. Ct. at 2603.

76. *Id. See* Lawrence v. Texas, 539 U.S. 558, 562 (2003).

77. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

78. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting); *see Obergefell*, 135 S. Ct. at 2617 (Roberts, C. J., dissenting) (quotation omitted) (invoking this comment from Justice Holmes's *Lochner* dissent).

79. Chief Justice Roberts's dissent stated that, "the Fourteenth Amendment does not enact John Stuart Mill's On Liberty any more than it enacts Herbert Spencer's Social Statics." *Obergefell*, 135 S. Ct. at 2622 (Roberts, C.J., dissenting). This comparison has been a topic of frequent discussion in treatments of substantive due process. *See* Myers, *End Substantive Due Process?*, *supra* note *†††*, at 604, 604 n.278.

80. *See Obergefell*, 135 S. Ct. at 2622 (Roberts, C.J., dissenting) (discussing the majority's apparent adoption of the harm principle).

81. *See, e.g.*, Baude, *supra* note 5.

82. 135 S. Ct. at 2621 (Roberts, C.J., dissenting).

doubtful whether *Obergefell* will be extended to the polygamy situation. Although broader social trends were not highlighted by Justice Kennedy, the Court is plainly influenced by the direction of elite culture. It seems doubtful whether the push for plural marriage will be embraced by the elite culture.[83]

The more important issue, in my estimation, is whether *Obergefell* will lead to judicial recognition of a right to assisted suicide. This is a far more important battleground. After *Casey*, a number of judges read the mystery passage as supporting the right to assisted suicide.[84] One of the judges who took this view was Judge Reinhardt of the Ninth Circuit[85] who is a cultural bellwether of sorts.[86] Judge Reinhardt's opinion was rejected by the Supreme Court in *Glucksberg*.[87] The autonomy view has, however, now been reaffirmed in *Lawrence* and in *Obergefell*. And *Obergefell* explicitly rejected *Glucksberg*'s methodology.

If the Court again considered the constitutionality of laws banning assisted suicide, it would find that the legal landscape has changed. There is a slow but discernible trend in favor of accepting the legality of assisted suicide. Assisted suicide is now legal in the Netherlands and Belgium,[88] which were also the first two countries to legalize same-sex marriage.[89] In February 2015, the Supreme Court of Canada held that bans on assisted suicide were

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83. *See* Sean Trende, *Why* Obergefell *is Unlikely to Lead to Polygamy*, REALCLEAR POLITICS (July 6, 2015), http://www.realclearpolitics.com/articles/2015/07/06/why_obergefell_is_unlikely_to_lead_to_polygamy_127242.html. Trende stated:

> For worse or for better, the societal transformation of public views on homosexuality almost certainly was a driving force in acceptance by the court of a right to same-sex marriage.
>
> But these factors are not present for those in plural marriage, and seem unlikely (though not impossible) to emerge anytime soon. Because of this, I think it's unlikely that we will follow *Obergefell* to its logical conclusion.

Id.

84. *See* Myers, *Physician-Assisted Suicide, supra* note 27, at 4 (noting these cases).

85. *See* Compassion in Dying v. Washington 79 F.3d 790, 813 (9th Cir. 1996), *rev'd sub nom.* Washington v. Glucksberg, 521 U.S. 702, 705, 708–09 (1997).

86. *See* Richard S. Myers, *The Virtue of Judicial Humility*, 13 AVE MARIA L. REV. 207, 208–09 (2015) [hereinafter Myers, *Judicial Humility*] (noting Judge Reinhardt's role).

87. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 708–09 (1997).

88. *See Euthanasia and assisted suicide laws around the world*, GUARDIAN (July 17, 2014), http://www.theguardian.com/society/2014/jul/17/euthanasia-assisted-suicide-laws-world.

89. *See* Lynn D. Wardle, *The Future of the Family: The Social and Legal Impacts of Legalizing Same-Sex Marriage*, 13 AVE MARIA L. REV. 237, 271 (2015) (citing Ross Toro, *Where Gay Marriage Is Legal (Infographic)*, LIVESCIENCE (Apr. 26, 2013, 4:55 PM) http://www.livescience.com/29099-states-where-gay-marriage-is-legal-infographic.html).

unconstitutional[90] in an opinion that departed from *Carter*'s counterpart to *Glucksberg*.[91]

In the United States, physician-assisted suicide is now legal in several states. Examples include: The Oregon Death with Dignity Act,[92] Washington's Death with Dignity Act,[93] and Vermont's Patient Choice and Control at End of Life Act.[94] A court decision has opened the door to physician-assisted suicide in Montana.[95] California recently legalized assisted suicide.[96] New Mexico's ban on assisted suicide was invalidated by a state trial judge, but that decision was reversed by the New Mexico Court of Appeals.[97] The New Mexico case was argued before the New Mexico Supreme Court on October 26, 2015.[98]

After *Glucksberg*, the landscape on assisted suicide was fairly stable.[99] For the most part, public opinion on the issue remained the same.[100] In the last few years, however, the "right to die" movement has gained some momentum. There have been increasing efforts to legalize assisted suicide in state legislatures.[101] Although most such legalization-of-assisted-suicide efforts have been defeated, the recent passage of California's legislation is tremendously significant. Moreover, public opinion has moved strongly in favor of assisted suicide in the last two years.[102]

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90. *See* Carter v. Canada, [2015] S.C.R. 5 (Can.), http://www.finalexitnetwork.org/Canada_Supreme_Court_decision_of_2-6-15_assisted_dying_.pdf. There are opinions from other countries going the other way. *See, e.g.*, Fleming v. Ireland [2013] IESC 19 (Ir.), http://www.courts.ie/judgments.nsf/09859e7a3f34669680256ef3004a27de/94ff4efe25ba9b4280257b5c003eea73?OpenDocument.

91. *See* Rodriguez v. British Columbia, [1993] 3 S.C.R. 519 (upholding *Carter*'s ban on assisted suicide).

92. *See* The Oregon Death with Dignity Act, OR. REV. STAT. §§ 127.800–.995 (1995).

93. *See* The Washington Death with Dignity Act, WASH. REV. CODE §§70.245.010–.904 (2009).

94. *See* Patient Choice at End of Life, VT. STAT. ANN. tit. 18, §§ 5281–92 (2013).

95. *See* Baxter v. State, 224 P.3d 1211, 1217, 1220–21 (Mont. 2009). The Supreme Court of Montana held that a doctor who assisted in the death of a terminally ill, mentally competent patient would be immune from a homicide prosecution. *Id.* The Court did not reach the broader state constitutional issue of whether there was a constitutional "right to die with dignity." *Id.* at 1214, 1221.

96. *See* Greg Botelho, *California Governor Signs 'End of Life' Bill*, CNN (Oct. 6, 2015), http://www.cnn.com/2015/10/05/us/california-assisted-dying-legislation.

97. *See* Morris v. Brandenburg, 356 P.3d 564, 585 (N.M. Ct. App. 2015), *cert. granted*, 369 P.3d 369 (2015), *and aff'd*, 376 P.3d 836 (2016). In *Morris*, the court considered whether New Mexico's ban on assisted suicide violated the New Mexico Constitution. *Id.* at 567. In considering the state constitutional arguments, New Mexico courts draw from United States Supreme Court decisions interpreting the United States Constitution for guidance. Id. at 573.

98. *Id.* at 1211.

99. *See* Myers, *Judicial Humility*, *supra* note 86, at 210–11.

100. *Id.*

101. *See* William Saunders, *Euthanasia Activists on the March to Legalize Assisted Suicide as 20 States Face New Legislation*, LIFENEWS.COM (May 7, 2015), http://www.lifenews.com/2015/05/07/euthanasia-activists-on-the-march-to-legalize-assisted-suicide-as-20-states-face-new-legislation.

102. *See* Michael Lipka, *California Legalizes Assisted Suicide Amid Growing Support for Such Laws*, PEW RESEARCH (Oct. 5, 2015), http://www.pewresearch.org/fact-tank/2015/10/05/california-legalizes-assisted-suicide-amid-growing-support-for-such-laws.

An early illustration of *Obergefell*'s impact on laws banning assisted suicide is now playing out in New Mexico. By a 2-1 vote,[103] the New Mexico Court of Appeals reversed a trial judge's decision to invalidate New Mexico's ban on assisted suicide under the state constitution. The two judges who voted to uphold the law thought, rather implausibly, that *Obergefell* had endorsed *Glucksberg*.[104] The dissent agreed with Chief Justice Roberts that *Glucksberg* had been effectively overruled. The dissent thought it most appropriate to adopt "the view of liberty, autonomy, and privacy elucidated in the *Casey*/*Lawrence*/*Obergefell* line of cases"[105] and, under this view of dignity and autonomy, the New Mexico ban on assisted suicide was unconstitutional.[106]

The New Mexico Supreme Court unanimously upheld the New Mexico law. The Court principally relied on *Glucksberg*.[107] The Court acknowledged that *Obergefell* seemed to adopt a different approach to substantive due process but ultimately concluded "that *Glucksberg* controls . . . ."[108] The New Mexico Court seemed influenced by the long standing and still persisting tradition in the law opposing assisted suicide. The Court also emphasized the complexity of the issues involved and took the view that such matters were better left to the legislative and executive branches.[109]

In addition, on May 3, 2016, in *Myers v. Schneiderman*, an intermediate appellate court in New York upheld the constitutionality of New York's law banning assisted suicide.[110] The court also relied heavily on *Glucksberg* in rejecting the constitutional challenges to New York's ban on assisted suicide.[111] The court rejected reliance on *Obergefell* and rather relied on the ongoing tradition opposing assisted suicide. The court stated, "[w]e are not

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103. *See Morris*, 356 P.3d at 567, 585.

104. *Id.* at 567, 578, 585–86 (opinion of Garcia, J.) (Hanisee, J., concurring in part).

105. *Id.* at 591, 601 (Vanzi, J., dissenting).

106. *See* Yoshino, *supra* note 43. In commenting on *Obergefell*'s discussion of *Glucksberg*, Professor Yoshino stated:

> This important passage [from *Glucksberg*] is open to at least two interpretations. Some unarticulated principle may distinguish physician-assisted suicide from marriage, such that *Glucksberg* would remain good law outside the context of marriage. Alternatively, the Court may be taking the familiar step of isolating precedent before overruling it altogether. While only future case law will provide a definitive answer, the latter seems more plausible for several reasons.

Id. at 165.

107. *See* Morris v. Brandenburg, 376 P.3d 836 (2016). The New Mexico Supreme Court decision was based on state constitutional law. The Court explained that the state constitutional analysis is informed by analogous federal law, which in this case principally involved the *Glucksberg* Court's interpretation of the due process clause.

108. *Id.* at 847.

109. *Id.* at 838.

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

111. *Id.* at 52 (noting that the New York courts largely use the same analytical method in interpreting state constitutional provisions, such as the due process clause, with federal counterparts).

persuaded from the record before us that, even though society's viewpoint on a host of social issues have changed over the last 20 years, aid-in-dying is an issue where a legitimate consensus has formed."[112] The court also emphasized the need for judicial restraint, in stating, "[c]onsidering the complexity of the concerns presented here, we defer to the political branches of government on the question of whether aid-in-dying should be considered a prosecutable offense."[113]

The trend in favor of assisted suicide is slow but discernible. Despite the recent rulings by the courts in New Mexico and New York, *Obergefell* gives a significant boost to court challenges to laws banning assisted suicide. It seems likely that *Glucksberg* will be overruled. Courts will likely now emphasize the "autonomy of self" philosophy and conclude that ending one's life is the ultimate act of self-determination. These courts will also likely reject the state's interest in preserving life because they will conclude that it violates autonomy to second-guess an individual's own subjective assessment of the value of her life.[114]

This result is not inevitable. Much depends on the Court's personnel at the time the issue comes before the Justices. And much depends on the direction of public opinion. It seems clear that the Justices in the majority in *Obergefell* did not think the ruling would prompt significant public backlash. Justice Ginsburg said as much before the decision[115] and Justice Kennedy seemed to express this view in a speech shortly after the decision.[116]

The legalization of assisted suicide would be tremendously significant. This is particularly true in places with aging populations and with the widespread concern about health care costs. In Belgium, recent statistics indicate "that the number of euthanasia and assisted-suicide deaths . . . has

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112. *Id.* at 55.

113. *Id.*

114. *See* Richard S. Myers, *Reflections on the Terri Schindler-Schiavo Controversy*, in LIFE AND LEARNING XIV: PROCEEDINGS OF THE FOURTEENTH UNIVERSITY FACULTY FOR LIFE CONFERENCE 27, 37 [hereinafter Myers, *Terri Schindler-Schiavo Controversy*] (Joseph W. Koterski, ed. 2005) (making this point). Available at SSRN: http://ssrn.com/abstract=2093637.

115. *See* Edward Whelan, *Injudicious Ginsburg*, NAT'L REV. ONLINE (Feb. 19, 2015), http://www.nationalreview.com/article/414026/injudicious-ginsburg (discussingcommentsbyJustice Ginsburg who when asked about a court ruling in favor of same-sex marriage said, "I think it's doubtful that it wouldn't be accepted.").

116. In a speech less than a month after the Obergefell decision, Justice Kennedy—according to the Associated Press:

> [L]ikened controversy over the [C]ourt's decision to allow gay marriage to public reaction over the 1989 ruling that said burning an American flag was protected free speech.
>
> Kennedy, who was the deciding vote in both cases, described how the reaction decades ago was critical at first but changed over time.

See Elliot Spagat, *Justice Kennedy Compares Gay Marriage Uproar to Flag Burning*, AP (July 15, 2015), http://bigstory.ap.org/article/14f52f94b86e4eeaa646a60832d571eb/justice-kennedy-acknowledges-gay-marriage-controversy.

increased by more than a hundred and fifty per cent" during the five years prior to 2015.[117]

In his dissent in *Obergefell*, Justice Alito commented that the only real constraint on the Court's power is a majority of the Court's "own sense of what those with political power and cultural influence are willing to tolerate."[118] This makes it all the more important for opponents of assisted suicide to restore the sanctity-of-life ethic.

There are some worrisome cultural trends on end-of-life issues. In the withdrawal of treatment cases such as the Terri Schiavo case,[119] the courts have accepted the idea that the lives of certain patients are not worth living.[120] The courts have, for the most part, not endorsed the idea that active measures to terminate life are permissible.[121] The underlying logic of the withdrawal of treatment cases, though, is quite troublesome. Moreover, there is growing practice and acceptance of euthanasia practiced under the cover of palliative sedation.[122] In fact, the misuse of palliative sedation (or terminal sedation) is sometimes referred to as "slow euthanasia."[123] From these practices, it is a very short step to a fundamental right to die. It seems likely that a Court that accepted the substantive due process methodology of the *Obergefell* majority would be all too willing to take that step.

CONCLUSION

Obergefell v. Hodges is an enormously important decision. In this article, the focus has been on the decision's likely impact on the doctrine of substantive due process. In *Obergefell*, the Court abandoned the *Glucksberg* Court's approach to substantive due process and endorsed the "autonomy of self" approach. It seems likely that a Supreme Court that took this approach

117. *See* Robert Carle, *Give Me Liberty and Give Me Death: Belgium's Brave New Euthanasia Regime*, PUB. DISCOURSE (Sept. 8, 2015), http://www.thepublicdiscourse.com/2015/09/15355 (noting statistics on increasing deaths in Belgium due to assisted suicide and euthanasia). *See also* Rachel Aviv, *The Death Treatment: When Should People with a Non-Terminal Illness Be Helped to Die?*, THE NEW YORKER (June 22, 2015), http://www.newyorker.com/magazine/2015/06/22/the-death-treatment (noting significant increases in deaths by assisted suicide in the Netherlands and Belgium).

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

119. For a discussion of these issues, *see* Myers, *Terri Schindler-Schiavo Controversy, supra* note 114.

120. *Id.* at 37–38.

121. *See* Myers, *Physician-Assisted Suicide*, *supra* note 27, at 16-17.

122. For a good discussion of palliative sedation, see Joseph J. Piccione, *Palliative Sedation*, in 3 ENCYCLOPEDIA OF CATHOLIC SOCIAL THOUGHT, SOCIAL SCIENCE, AND SOCIAL POLICY, Supplement, 255, 255–58 (Michael L. Coulter, Richard S. Myers & Joseph A. Varacalli eds., 2012). For other discussions, see Yale Kamisar, *Are the Distinctions Drawn in the Debate about End-of-Life Decision Making "Principled"? If Not, How Much Does It Matter?*, 40 J.L. MED. & ETHICS 66, 76–79 (Robert M. Sade ed., 2012). *See also* Margaret P. Battin, *Terminal Sedation: Pulling the Sheet over Our Eyes*, 38(5) HASTINGS CENTER REPORT 27, 27–30 (2008).

123. David Orentlicher, *The Supreme Court and Terminal Sedation: Rejecting Assisted Suicide, Embracing Euthanasia*, 24 HASTINGS CONST. L.Q. 947, 955 (1997) (quotation omitted).

seriously would overrule *Glucksberg* and discover a constitutional right to assisted suicide. This would not be a desirable development, but it seems a likely outcome from the Court's discovery that "moral relativism *is* a constitutional command."[124]

124. This phrase comes from a law review article in which the author celebrated this idea. *See* Steven G. Gey, *Is Moral Relativism a Constitutional Command?*, 70 IND. L.J. 331, 376 (1995) (emphasis in original).