

ARTICLES

ASSISTED SUICIDE AND REPRODUCTIVE FREEDOM: EXPLORING SOME CONNECTIONS

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The anticipation of the Supreme Court's 1997 rulings on the constitutionality of assisted suicide provoked an interesting debate among feminist legal theorists. Based largely on references to self-determination both in these cases and in litigation challenging abortion restrictions, some feminists contended that continued protection of reproductive autonomy requires recognizing a right to assisted suicide.¹ Other scholars, citing danger to feminist objectives, rejected arguments linking reproductive freedom and a "right to die."²

The connections between these issues are sure to be explored anew now that the Supreme Court has decided *Washington v. Glucksberg*³ and *Vacco v. Quill*,⁴ rejecting both due process and equal protection challenges to assisted suicide bans while purporting to leave undisturbed existing abortion precedents.⁵ This Essay takes a brief look at three particular connections between the assisted-suicide cases and reproductive freedom.

Part I examines the two-part test for substantive due process protection

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1. See, e.g., Brief for the National Women's Health Network and Northwest Women's Law Center as Amici Curiae in Support of Respondents, *Vacco v. Quill*, 117 S. Ct. 2293 (1997) (No. 95-1858), available in 1996 WL 709341; *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997). See also, e.g., Leslie Bender, *A Feminist Analysis of Physician-Assisted Dying and Voluntary Active Euthanasia*, 59 TENN. L. REV. 519 (1992).

2. See, e.g., Susan M. Wolf, *Physician-Assisted Suicide, Abortion, and Treatment Refusal: Using Gender to Analyze the Difference*, in *PHYSICIAN-ASSISTED SUICIDE* 167 (Robert F. Weir ed., 1997).

3. 117 S. Ct. 2258 (1997).

4. 117 S. Ct. 2293 (1997).

5. For example, the Minnesota Law Review has scheduled a symposium on *Glucksberg* and *Quill*, based on a panel discussion of these cases at the 1998 Annual Meeting of the Association of American Law Schools. Participants include Professors Sylvia A. Law, author of the brief cited *supra* note 1, and Susan M. Wolf, author of the essay cited *supra* note 2. See *Physician-Assisted Suicide: After Vacco v. Quill and Washington v. Glucksberg*, AALS LAW, MEDICINE AND HEALTH CARE SECTION ANNUAL NEWSLETTER (AALS, Washington D.C.) Dec. 1997, at 1.

articulated in *Glucksberg* and raises questions about what this test might mean for the future of reproductive freedom. Part II, which considers *Quill*'s reinforcement of the traditional distinction between omissions and actions, reviews the feminist critique of the omission-duty principle. This Part also shows how variable understandings of "omission" and "action" have allowed the Court both (a) to constrict abortion rights in the abortion-funding cases and their aftermath and (b) to overlook a persuasive argument for abortion freedom, the samaritan argument. Part III explores *Glucksberg*'s conclusion that the debate on assisted suicide should continue, emphasizing the possible consequences for reproductive autonomy of the Court's implicit suggestion that Congress might ultimately resolve this debate. Throughout, this Essay reveals how the Court's analysis in *Glucksberg* and *Quill* overlooks—not necessarily inadvertently—important implications for reproductive rights.

I. RESHAPING "PRIVACY"

Under one feminist position expressed while awaiting the Supreme Court's decisions, the future of constitutional "privacy" was at stake in *Glucksberg*. Certainly the opinion of the United States Court of Appeals for the Ninth Circuit in *Compassion in Dying v. Washington*⁶ (later captioned *Glucksberg*) lent strength to this position, for the Ninth Circuit squarely rested its recognition of a limited right to assisted suicide on Supreme Court precedents according constitutional protection to reproductive autonomy. In particular, the Ninth Circuit relied substantially on *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁷ the Court's last major word on reproductive freedom.⁸ *Casey*, decided in 1992, promised some continued measure of abortion choice in the face of calls to overrule *Roe v. Wade*.⁹ Yet, right away, it was clear from the division on the Court in *Casey*,¹⁰ the

6. 79 F.3d 790 (9th Cir. 1996) (en banc).

7. 505 U.S. 833 (1992).

8. See 79 F.3d at 813-14 (relying on *Casey*, stating that "Like the decision of whether or not have an abortion, the decision how and when to die is one of 'the most intimate and personal choices a person may make in a lifetime,' a choice 'central to personal dignity and autonomy.'").

9. 410 U.S. 113 (1973). See *Casey*, 505 U.S. at 844.

10. Five Justices voted to accord some constitutional protection to abortion choice. Three of these, Justices O'Connor, Souter, and Kennedy, wrote a joint opinion adopting an "undue burden" test, under which state-required information and waiting periods for abortion patients survive constitutional scrutiny, but a spousal-notification requirement does not. The other two of these five, Justices Stevens and Blackmun, would have adhered to the strict scrutiny and trimester timetable announced in *Roe*, tests that the challenged legislation could not have survived. The four remaining Justices, Chief Justice Rehnquist and Justices White, Scalia, and Thomas, would have overruled *Roe* and upheld all the challenged provisions of the Pennsylvania statute under the rational-basis test.

indeterminacy of the joint opinion's "undue burden" test,¹¹ and the subsequent changes in the Court's composition¹² that the Court's *next* word on "privacy" or substantive due process¹³ would prove critically important well beyond the immediate context in which such issues might arise. The Ninth Circuit's opinion and the Supreme Court's decision to review *Glucksberg* indicated that assisted suicide would provide the next opportunity for the Court to elaborate and refine its understanding of privacy and liberty. From this point of view, then, whatever the Supreme Court might decide in *Glucksberg* would have a powerful influence on subsequent litigation about other matters of self-determination of particular interest to feminists, including abortion, contraception, and even assisted conception.¹⁴

Other feminists, however, saw a bright line distinguishing assisted suicide from matters of reproductive autonomy. Restrictions on abortion and contraception implicate gender equality, as the Court acknowledged (albeit belatedly) in *Casey*.¹⁵ This is not so for bans on assisted suicide, which affect

11. The joint opinion's definition of the standard is difficult to grasp: "[A]n undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 877. Particularly pointed criticism of this standard appears in some of the other opinions in *Casey*. See *id.* at 964-65 (Rehnquist, C.J., concurring in judgment in part and dissenting in part) (concluding that this standard has no basis in constitutional law, will prove difficult to apply, and is "not built to last"); *id.* at 985-93 (Scalia, J., concurring in judgment in part and dissenting in part) (stating that the test is "standardless" and "rootless" and it appears to mean only "that a State may not regulate abortion in such a way as to reduce significantly its incidence"). For commentary examining the standard, see Kathleen M. Sullivan, *The Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 32-34 (1992).

12. After *Casey*, Justice Ginsburg replaced Justice White and Justice Breyer replaced Justice Blackmun.

13. *Roe* found that the "right to privacy" protects the decision whether to terminate a pregnancy and located this right in the protection of liberty conferred by the Fourteenth Amendment's Due Process Clause. See *Roe*, 410 U.S. at 153. *Casey* eschewed the language of "privacy" in favor of that of "liberty," acknowledging that the Due Process Clause "has been understood to contain a substantive component . . . 'barring certain government actions regardless of the fairness of the procedures used to implement them.'" *Casey*, 505 U.S. at 846 (1992) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). See also *Casey*, 505 U.S. at 847-51, 857.

14. See, e.g., Brief for National Women's Health Network, *supra* note 1. This brief contends, inter alia, (a) that declining to recognize protection for assisted suicide, based on "a wooden historical approach to constitutional jurisprudence . . . is particularly threatening to women," and (b) that allowing a state to override autonomy on the basis of interests in protecting the vulnerable and promoting respect for life reflects an approach "historically . . . utilized in ways that have been particularly damaging to women." *Id.*, 1996 WL 709341, at *4, *10. For the argument that reproductive autonomy is an expansive right that includes the freedom to resort to modern responses to infertility, including collaborative conception and "high-tech" medical procedures, see JOHN A. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* (1994).

15. Commentators had noted how *Roe*'s privacy analysis overlooked the manner in which abortion restrictions undermine gender equality. See, e.g., Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 375 (1985); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984). The Court began to emphasize

men and women alike.¹⁶ This distinction arguably would allow the Court to uphold prohibitions on assisted suicide without threatening the constitutional status of reproductive freedom.¹⁷ This approach, if taken in *Glucksberg*, would strengthen gender equality as a constitutional value by making it, in hindsight, the determinative element in the abortion and contraception cases.

Some feminists pushed the gender-equality point still further, contending that recognition of a right to assisted suicide would pose real danger to women. They argued that the vulnerability of women and their readiness for self-sacrifice would turn any such right into a tool for the ultimate oppression of women.¹⁸

In deciding *Glucksberg*, the Court adopted neither of these positions. The approach used, however, offers ample grounds for feminists to debate the implications.

A first reading of the the majority opinion in *Glucksberg* might find the constitutional status of reproductive autonomy no weaker than it was before. The Court explicitly reaffirms *Casey*, distinguishing constitutional protection for the right to abortion from that sought for assisted suicide.¹⁹ In making this distinction, the Court identifies two key requirements for substantive due process protection: First, the asserted fundamental right must be “objectively, ‘deeply rooted in this Nation’s history and tradition...’”²⁰ Second,

the woman’s role in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 772 (1986). But *Casey* stands out as the first case in which the Court acknowledges the importance of abortion rights for gender equality. *See, e.g., Casey*, 505 U.S. at 856 (holding that “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”); *id.* at 928 (opinion of Blackmun, J., concurring in part and dissenting in part) (stating that “[a] State’s restrictions on a woman’s right to terminate her pregnancy also implicate constitutional guarantees of gender equality.”).

16. *See* *Washington v. Glucksberg*, 117 S. Ct. 2258, 2303 (1997) (O’Connor, J., concurring) (observing that “[e]very one of us at some point may be affected by our own or a family member’s terminal illness.”).

17. *See, e.g.,* Seth F. Kreimer, *Does Pro-Choice Mean Pro-Kevorkian? An Essay on Roe, Casey, and the Right to Die*, 44 AM. U. L. REV. 803, 849-50 (1995); Marc Spindelman, *Are the Similarities Between a Woman’s Right to Choose an Abortion and the Alleged Right to Assisted Suicide Really Compelling?*, 29 U. MICH. J.L. REF. 775, 821-26 (1996); Cass R. Sunstein, *The Right to Die*, 106 YALE L.J. 1123, 1161 (1997); Wolf, *supra* note 2, at 177-78. *See also* Brief of the Center for Reproductive Law & Policy as Amicus Curiae in Support of Respondents, *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997) (No. 96-110).

18. *See* Susan M. Wolf, *Gender, Feminism, and Death: Physician-Assisted Suicide and Euthanasia*, in *FEMINISM & BIOETHICS: BEYOND REPRODUCTION* 282 (Susan M. Wolf ed., 1996). *See also* Jocelyn Downie & Susan Sherwin, *A Feminist Exploration of Issues Around Assisted Death*, 15 ST. LOUIS U. PUB. L. REV. 303, 322, 326 (1996) (raising such concerns, while supporting permissive policy of assisted death based on respect for autonomy).

19. *See Glucksberg*, 117 S. Ct. at 2267 (listing constitutionally protected liberties, including abortion).

20. *Id.* at 2268 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

“substantive-due-process cases [require] a ‘careful description’ of the asserted fundamental liberty interest.”²¹ The Court finds assisted suicide fails the first test, given that “[t]he 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.”²² And unlike abortion, which also concerns an intimate and personal question of self-determination, the right claimed in *Glucksberg* defies precise description. The Court quotes various formulations advanced by proponents, including “a liberty interest in determining the time and manner of one’s death,”²³ “a ‘liberty to choose how to die,’”²⁴ “a right to ‘control of one’s final days,’”²⁵ “the right to choose a humane, dignified death,”²⁶ and “the liberty to shape death.”²⁷

A closer look at the majority’s analysis, however, raises questions about whether a constitutional right to abortion truly escapes unscathed. Critics of constitutional protection for abortion might easily seize on *Glucksberg* to point out the vulnerabilities it creates.²⁸ The very formulation that allows the right to abortion to meet *Glucksberg*’s “precision” requirement arguably poses difficulties when subjecting abortion to *Glucksberg*’s requirement of “objective history.”²⁹ True, *Roe v. Wade* makes a persuasive case for the significant abortion freedom women enjoyed in ancient times and at common law,³⁰ yet, if the relevant time is when the Fourteenth Amendment was adopted, then the case for protection within this Nation’s history, viewed objectively, becomes problematic.³¹ On the other hand, situating abortion in

21. *Id.* (quoting, *inter alia*, *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

22. *Id.* at 2271. *See also id.* at 2269.

23. *Id.* at 2269.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *See, e.g.*, James Bopp, Jr. & Richard E. Coleson, *Roe v. Wade and the Euthanasia Debate*, 12 ISSUES IN L. & MED. 343 (1997). *See also, e.g.*, Brief Amici Curiae of the United States Catholic Conference in Support of Petitioner State of Washington, *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997) (No. 96-110), available in 1996 WL 650919 (contending that the “Court’s historical account in *Roe* is seriously flawed”). *Id.*, 1996 WL 650919, at *11.

29. I am indebted to Mandee Rosler for this observation.

30. *See Roe v. Wade*, 410 U.S. 113, 129-41 (1973).

31. Justice Rehnquist’s dissent in *Roe* asserts that in 1868, when the Fourteenth Amendment was adopted, “there were at least 36 laws enacted by state or territorial legislatures limiting abortion.” *Id.* at 175. For historical accounts of the development of American abortion prohibitions in the nineteenth century, see KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 20-29 (1984); JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900* (1978); Carroll Smith-Rosenberg, *The Abortion Movement and the AMA, 1850-1880*, in CARROLL SMITH-ROSENBERG, *DISORDERLY CONDUCT: VISIONS OF GENDER IN VICTORIAN AMERICA* 217 (1985).

In *Casey*, the Court explicitly rejected 1868 as the reference point: “Neither the Bill of Rights nor

more expansive protection that includes bodily integrity, family autonomy, and freedom of conscience offers considerable support from this country's history and tradition.³² But that formulation would then fail the "precision" test for the same reasons the Court cites in rejecting constitutional protection for assisted suicide. Indeed, some of the Justices themselves have observed in the past that requiring an asserted interest to be articulated narrowly and carefully, while still insisting on tracing its roots to this country's history and traditions, might well spell the end of constitutional protection for a variety of liberties we expect to be safeguarded, including use of and access to contraception, freedom from race-based restrictions on marriage, and the rights of unmarried fathers.³³ No doubt, the two-part test announced in *Glucksberg* would create significant obstacles for an expansive constitutional right to reproductive choice that includes protection for access to assisted conception and other "high-tech" procedures.³⁴

Certainly the Court had other avenues it might have followed to reach *Glucksberg*'s result. For example, the Justices might have adopted the second feminist perspective outlined above, distinguishing abortion from assisted suicide on the basis of the gender issues raised only by the former. This approach would have rejected constitutional protection for assisted suicide, while preserving it for abortion (and other freedoms implicating gender equality, such as contraception).

Alternatively, the *Glucksberg* majority might have followed Justice Souter's concurrence,³⁵ which relies on Justice Harlan's famous dissent in *Poe v. Ullman*.³⁶ This analysis, on which the Court placed substantial reliance in its encomium to abortion freedom in *Casey*,³⁷ employs "a concept of 'ordered liberty,' . . . comprising a continuum of rights to be free from 'arbitrary impositions and purposeless restraints' . . ."³⁸ This approach, which emphasizes the traditional values that due process protects, requires judicial review of the substance of legislation for reasonableness "without . . .

the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 848 (1992).

32. *See, e.g., Casey*, 505 U.S. at 848-50.

33. *See id.* at 847-48. *See also* Michael H. v. Gerald D., 491 U.S. 110, 132 (1989) (O'Connor, J., concurring in part, joined by Kennedy, J.).

34. For an argument in favor of a broad right to reproductive autonomy, see ROBERTSON, *supra* note 14.

35. *See* *Washington v. Glucksberg*, 117 S. Ct. 2258, 2275-93 (1997).

36. 367 U.S. 497, 522, 539-55 (1961).

37. *Casey*, 505 U.S. at 848-53.

38. *Glucksberg*, 117 S. Ct. at 2281-82 (Souter, J., concurring) (quoting *Poe*, 367 U.S. at 549, 543 (Harlan, J., dissenting)).

equating reasonableness with past practice described at a very specific level.”³⁹ In other words, the analysis looks to history for broad principles, not discrete rights. According to Justice Souter, the Constitution invalidates legislation for violating substantive due process only when two conditions are met. First, the individual liberty interest asserted must be “sufficiently important to be judged ‘fundamental,’”⁴⁰ and second, “the legislation’s justifying principle, critically valued, is so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied. . . .”⁴¹ This formulation, as Souter spells out, safeguards individual interests in reproductive autonomy without extending similar protection for assisted suicide, because in the latter context the state’s interests “are sufficiently serious to defeat the present claim that its law is arbitrary or purposeless.”⁴²

II. OMISSIONS AND ACTIONS

Glucksberg’s companion case, *Quill*, centers on a different issue of special interest in feminist legal theory—the legal consequences of the traditional distinction between omissions and actions. The Court of Appeals for the Second Circuit held that New York’s ban on assisted suicide violates the Equal Protection Clause because the ban irrationally distinguishes between two classes of the terminally ill: those who can get help hastening death through the permissible removal of life support versus those requiring prohibited active assistance to achieve the same goal, for example, the prescription of drugs.⁴³ In reversing the Second Circuit’s decision, the Supreme Court invokes causation, intent, and the distinction between killing and letting die to reinforce the law’s different treatment of actions and omissions.⁴⁴

39. *Glucksberg*, 117 S. Ct. at 2281 (Souter, J., concurring).

40. *Id.* at 2282 (quoting *Poe*, 367 U.S. at 548 (Harlan, J., dissenting)).

41. *Id.* at 2283.

42. *Id.* at 2290. Justice Souter concludes by cautioning: “While I do not decide for all time that respondents’ claim should not be recognized, I acknowledge the legislative institutional competence as the better one to deal with that claim at this time.” *Id.* at 2293.

43. *See Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996).

44. *See Vacco v. Quill*, 117 S. Ct. 2293, 2298-2301 (1997). The Court does not use the terms “actions” and “omissions” but clearly follows this traditional dichotomy, invoking “fundamental legal principles of causation and intent,” *id.* at 2298, as well as the Court’s own recognition of the difference “between letting a patient die and making that patient die.” *Id.* at 2301.

Several of the briefs filed in *Glucksberg* and *Quill* had urged the Court to abandon the traditional action-omission distinction or to find it irrational, as the Second Circuit Court of Appeals had. *See, e.g.*, Brief Amicus Curiae of State Legislators in Support of Respondents, *Vacco v. Quill*, 117 S. Ct. 2293 (1997) (No. 95-1858), and *Washington v. Glucksberg*, 117 S. Ct. 2258 (No. 96-110) (from patient’s perspective, interests do not differ); Brief for Ronald Dworkin et al. as Amici Curiae in Support of Respondents, *Washington v. Glucksberg*, 117 S. Ct. 2258 (No. 96-110), and *Vacco v.*

The action-omission distinction has an important corollary, the omission-duty rule or “Bad Samaritan” principle.⁴⁵ This principle, a perennial target of first-year law students and more established legal scholars alike,⁴⁶ provides that inaction triggers liability only when the inaction occurs in breach of a legal duty. Because such legal duties are few and far between, this principle means that in many situations one can walk away from a person in need of help without incurring liability even if, as a result, the person in need dies. In the face of widespread criticism of the rule,⁴⁷ its often cited justifications include “notions of individual freedom and autonomy that pervade our society[;]”⁴⁸ support for a laissez-faire role for government under which it “is inappropriate for the law to require one person to act solely for the benefit of another[;]”⁴⁹ criminal law’s special role of curbing official power to protect individual rights and liberties,⁵⁰ the goal of having legal rules that promote efficiency,⁵¹ as well as concerns about priorities,⁵² vagueness,⁵³ line-drawing,⁵⁴ and the risk of “overreaction.”⁵⁵

Quill, 117 S. Ct. 2293 (1997) (No. 95-1858) (arguing distinction between killing and letting die “is based on a misunderstanding of the pertinent moral principles”). See also Alan Meisel, *Physician-Assisted Suicide: A Common Law Roadmap for State Courts*, 24 *FORDHAM URB. L.J.* 817, 825-45 (1997) (criticizing purported distinction and demonstrating why causation and intent do not support distinction).

45. See Anthony D’Amato, *The “Bad Samaritan” Paradigm*, 70 *NW. U. L. REV.* 798 (1975).

46. See, e.g., Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 *VAND. L. REV.* 673 (1994); Arthur Leavens, *A Causation Approach to Criminal Omissions*, 76 *CAL. L. REV.* 547 (1988); Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 *WASH. U. L.Q.* 1 (1993).

47. This generalization does not mean that the rule lacks any supporters. See, e.g., Richard A. Epstein, *A Theory of Strict Liability*, 2 *J. LEGAL STUD.* 151, 189-204 (1973).

48. Leavens, *supra* note 46, at 577. See John Kleinig, *Criminal Liability for Failures to Act*, 49 *LAW & CONTEMP. PROBS.* 161, 170 (1986); Yeager, *supra* note 46.

49. Heyman, *supra* note 46, at 676.

50. See Meir Dan Cohen, *Actus Reus*, in 1 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 15, 20 (Sanford H. Kadish ed., 1983).

51. See William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 *J. LEGAL STUD.* 83, 119-27 (1978).

52. That is, government should concentrate its limited resources on those who pose affirmative dangers. See SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 181-97 (6th ed. 1995) (so suggesting). See also MARY ANN GLENDON, *RIGHTS TALK* 83 (1991) (quoting PROSSER & KEETON on similar rationale in tort law).

53. See KADISH & SCHULHOFER, *supra* note 52, at 181-97 (so suggesting); Leavens, *supra* note 46, at 581 (“Commentators have objected that omissions cases inherently raise unique problems of notice. . .”). The need for a “clearly ascertainable event” triggering liability is less likely to be satisfied by an omission than an act. See Cohen, *supra* note 50, at 20.

54. See KADISH & SCHULHOFER, *supra* note 52, at 181-97 (so suggesting). See Epstein, *supra* note 47, at 198 (it would be “very hard to set out in a principled manner the limits of social interference with individual liberty.”).

55. Yeager, *supra* note 46, at 38-39 (citing the possibility of victims overwhelmed by the aid of hundreds of rescuers all obliged to act by the criminal law).

Under the omission-duty rule, a stranger can leave a baby to drown in a shallow pool,⁵⁶ an adult child can leave an incapacitated parent to die in squalor in a nearby bedroom,⁵⁷ and one who invites a family to stay at her home can stand by and watch the parent beat the child to death,⁵⁸ all without incurring liability, given the absence of a legal duty to aid in each case. First-year law students resist the omission-duty principle's acceptance of these intuitively offensive and immoral outcomes, as I see each year when I teach criminal law. Among the principle's numerous other critics, feminist scholars cite this rule as evidence of mainstream jurisprudence's emphasis on individuality and autonomy at the expense of caring and connection—values much more familiar to women and more consistent with women's way of looking at the world.⁵⁹ If our legal rules had developed based on a female norm, goes the argument, then we well might be expected routinely to act to aid others, either through the recognition of a more comprehensive list of legal duties or through abandonment of the duty requirement altogether.⁶⁰ Certainly, a jurisprudence based on caring and connection would not permit the outcomes in the three situations described above.⁶¹

Feminists have another reason to question the omission-duty principle. Its foundation, the distinction between actions and omissions, has no consistent boundaries.⁶² And the malleability of precisely what constitutes an omission for purposes of the rule has, in a few notable examples, yielded results decidedly unfriendly to reproductive rights. In other words, this critique does not contend that *Quill* should have treated suicide assistance as an omission; rather, it questions the coherence of the distinction underlying the Court's analysis.⁶³

56. This is the paradigm case. See, e.g., KADISH & SCHULHOFER, *supra* note 52, at 196 (this scenario describes "the classic omission case where, under common law doctrine, there is no duty and hence no liability.").

57. See *People v. Heitzman*, 886 P.2d 1229 (Cal. 1994). See also Mary Bruno et al., *Abusing the Elderly*, NEWSWEEK, Sept. 23, 1985, at 75.

58. See *Pope v. State*, 396 A.2d 1054 (Md. 1979).

59. See, e.g., Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 18, 58 (1988). See also GLENDON, *supra* note 52, at 77 (finding unexpressed premise in American law, specifically treatment of omissions, that "we roam at large in a land of strangers, where we presumptively have no obligations toward others except to avoid the active infliction of harm."); Ann C. Scales, *Surviving Legal De-Education: An Outsider's Guide*, 15 VT. L. REV. 139, 143 (1990) (critiquing old torts cases rejecting liability for failure to rescue injured child, despite moral duty to act).

60. See Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 33-36 (1988).

61. See *supra* text at notes 56-58.

62. See, e.g., Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990).

63. The Court itself recognizes the difficulty in maintaining the distinction when acknowledging the practice of "terminal sedation," a form of aggressive palliative care known to cause death, despite

A. The Abortion-Funding Cases

Consider first the abortion-funding cases.⁶⁴ In these cases, the Supreme Court relied on the concept of state inaction or omission to distinguish the criminal restrictions on abortion invalidated in *Roe v. Wade* from selective funding schemes. Under these funding programs, the government subsidizes continued pregnancy and childbirth for indigent women but refuses such assistance for their abortions. In upholding such programs, the Court explained that the failure to subsidize even medically necessary abortions does not “impinge” on the constitutionally protected right recognized in *Roe* because this essentially negative right⁶⁵ confers no “entitlement” to public support for its exercise.⁶⁶ The Court made plain its understanding of the government’s role as one of inaction by emphasizing that the challengers were no worse off than if the government provided no medical assistance at all⁶⁷ and by contrasting the passivity of the nonsubsides with the active intrusion on constitutional rights that occurs when the state imposes obstacles,⁶⁸ penalties,⁶⁹ restrictions,⁷⁰ and “unduly burdensome” interferences.⁷¹ In announcing the two-track system for such state omissions and actions, the Court said that the rational basis test governs “passive” anti-abortion laws, rather than the strict judicial scrutiny that *Roe* required for “active” limitations.⁷²

the prohibition of assisted suicide. *See* *Vacco v. Quill*, 117 S. Ct. 2293, 2301 n.11 (1997). *See also* *Cruzan v. Director, Missouri Dep’t of Health*, 497 U.S. 261, 295-99 (Scalia, J., concurring) (questioning distinction between refusing life-sustaining treatment and suicide).

64. *See* *Harris v. McRae*, 448 U.S. 297 (1980) (upholding federal Hyde Amendment, which provides no assistance for medically necessary abortions for indigent women, despite funding for prenatal care and childbirth for such women); *Williams v. Zbaraz*, 448 U.S. 358 (1980) (upholding similar state measure); *Maher v. Roe*, 432 U.S. 464 (1977) (upholding constitutionality of state’s refusal to pay for elective abortions while paying for childbirth services). *See also* *Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding “gag rule,” which withheld government financial support from family planning clinics that provide abortion counseling).

65. *See* Susan Frelich Appleton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights Thesis*, 81 COLUM. L. REV. 721, 735 (1981).

66. *See, e.g., McRae*, 448 U.S. at 316, 318.

67. *See id.* at 314, 317; *Maher*, 432 U.S. at 474. Scholars have questioned the Court’s choice of the absence of all medical care as the “baseline” for analysis. *See, e.g.,* Bandes, *supra* 62, at 2343-44; Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1359-74 (1984) (alternative baselines); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1440 (1989).

68. *See McRae*, 448 U.S. at 316; *Maher*, 432 U.S. at 474.

69. *See McRae*, 448 U.S. at 317 n.19; *Maher*, 432 U.S. at 474 n.8.

70. *See McRae*, 448 U.S. at 314; *Maher*, 432 U.S. at 474.

71. *See McRae*, 448 U.S. at 314; *Maher*, 432 U.S. at 474.

72. *See McRae*, 448 U.S. at 316-17, 324; *Maher*, 432 U.S. at 474, 478. *See also* *Roe v. Wade*, 410 U.S. 113, 155-56 (1973).

The Court's analysis, however, reveals several salient departures from the classic omission framework and its underpinnings, indicating just how far the traditional approach had to be stretched to fit the facts of the abortion-funding cases. First, the traditional approach was always careful to distinguish "pure inaction" from situations in which the "inactor" had begun to aid or had undertaken action in conjunction with the omission in question. Indeed, one of the legal duties commonly listed among the omission-duty principle's exceptions includes the obligation to continue providing assistance by one who has started to help.⁷³ In setting forth the omission-duty rule, the Model Penal Code's provision on omissions explicitly speaks of an "omission unaccompanied by action."⁷⁴ The abortion-funding cases do not fit this paradigm because in order to view the selective funding schemes as inaction, the Court had to sever the link between the nonfunding of abortions and the subsidizing of childbirth, not to mention the provision of all other necessary medical care by the state.⁷⁵

Thus, in contrast to the proposal of some critics to abandon the traditional omission-duty principle by considering each would-be omission in the context of what the "inactor" did over a *longer* period of time,⁷⁶ in the abortion-funding cases the Court examined only the narrowest slice of the government's conduct at the moment of alleged constitutional violation.⁷⁷ But the Court did not stop with its narrow look at nonsubsidies as inaction, for after ignoring contemporaneous aspects of the same government program, in particular the support for childbirth, the Court later made such

73. See, e.g., WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 3.3(4), at 205.06 (2d ed. 1986). See also Epstein, *supra* note 47, at 194 (describing, but rejecting, this rule in tort law).

74. MODEL PENAL CODE § 2.01(3) (1985).

75. See Appleton, *supra* note 65, at 738-40.

76. See Leavens, *supra* note 46, at 583-84.

77. The Court used essentially the same approach several years later in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). *DeShaney* characterized the conduct of the state as inaction after the state investigated a family because of reports of child abuse, returned custody of young Joshua to the father, and then failed to prevent the father from inflicting severely debilitating injuries on his son. See *id.* at 196. Relying on the abortion-funding cases, the majority held that due process does not compel affirmative acts of child protection by the state. See *id.* (citing *Harris v. McRae*, 448 U.S. 297, 317-18 (1980)). See GLENDON, *supra* note 52, at 92-98 (explaining the Court's analysis). But see Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991) (contending that the *DeShaney* Court misread history to reach incorrect conclusion that original understanding of Fourteenth Amendment does not include positive right to protection). Certainly, only the most limited and out-of-context look at the state's behavior would see inaction subject to the traditional omission-duty rule. See *DeShaney*, 489 U.S. at 204-05 (Brennan, J., dissenting) (concluding that state had acted); Bandes, *supra* note 62, at 2289-90 (line between action and inaction blurs in context of pervasive regulation of child-protective services); Patricia M. Wald, *Government Benefits: A New Look at an Old Gifhorse*, 65 N.Y.U. L. REV. 247, 262 (1990) ("[T]he county's relationship to [the victim] cannot accurately be described as 'inaction' . . .").

action relevant. In ultimately finding the selective funding rational, the Court considered the two parts of the program together as forming a reasonable means of "encouraging childbirth" and expressing official pro-childbirth value judgments.⁷⁸

One also can see the distortion of the ordinary understanding of "omission" in these cases by examining the misfit between the abortion-funding scenario and the traditional justifications for the omission-duty principle. One such justification claims the principle protects individual autonomy and curbs government intrusion.⁷⁹ But this laissez-faire rationale gets turned on its head in the abortion-funding cases, in which the "inactor" protected by the rule is the government itself,⁸⁰ while individuals asserting claims of autonomy and privacy (and not far-fetched claims, given *Roe*⁸¹) find the principle defeats their liberty. Indeed, the Court has used the omission-duty principle to signal approval of dramatically *increased* government involvement in the personal lives of individuals. In validating the challenged laws as rational mechanisms for encouraging childbirth, the Court authorized funding schemes purposely designed to influence one of the most intimate choices, whether to terminate a pregnancy or carry it to term. The laws upheld by the Court thus reflect a remarkable level of state intrusion into individual decisionmaking.⁸²

78. See *Harris v. McRae*, 448 U.S. 297, 314 (1980); *Maier v. Roe*, 432 U.S. 464, 474, 478 (1977). Such official value judgments in favor of childbirth had appeared foreclosed by *Roe*, at least before viability. See Michael J. Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae*, 32 STAN. L. REV. 1113 (1980).

79. See *supra* notes 49-50 and accompanying text.

80. It is ironic, then, that Heyman finds his strongest basis for a duty to rescue in public law, invoking what the individual owes to the state as a starting point. See generally Heyman, *supra* note 46. But he also finds that the state has an obligation to meet the subsistence needs of its members. See *id.* at 727-28, 738. Such subsistence needs must include necessary medical care, which would presumably encompass therapeutic abortions. See also Bandes, *supra* note 62, at 2317 ("Even accepting as a given that people should not be legally bound to help one another, the question remains whether government should be legally bound to help its citizens.").

Some have argued that the holdings in the abortion-funding cases also protect individual taxpayers who morally oppose abortion. See Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 1008-11, 1046-47 (1991). But see Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 339-40 (1985).

81. See, e.g., Perry, *supra* note 78.

82. This legacy of the abortion-funding cases emerges today in welfare-reform plans expressly constructed to discourage childbearing among the poor, so-called "family caps" and "child exclusions." See generally Susan Frelich Appleton, *Standards for Constitutional Review of Privacy-Invasive Welfare Reforms: Distinguishing the Abortion-Funding Cases and Redeeming the Undue-Burden Test*, 49 VAND. L. REV. 1 (1996). These are not government "hands-off" plans, but rather systematic and intricate measures developed by states and Congress to decrease illegitimate births and teenage pregnancies by withholding support for any additional children born to a parent already receiving welfare and denying assistance for children born to teens. See generally Susan Frelich

Similarly, other concerns cited to justify the omission-duty principle, such as those based on vagueness and priorities, have no role to play in explaining the abortion-funding cases.⁸³ In this situation, the same government that subsidizes childbirth would have the affirmative duty to act, eliminating the worry about how to select which of hundreds of “inactors” ought to be required to help.⁸⁴ And, in terms of choosing priorities in the allocation of scarce resources, the Court has acknowledged that subsidizing childbirth costs far more than subsidizing abortion.⁸⁵

But the Court’s manipulation of the action-omission distinction did not stop here. In subsequent cases, the Court relied on the abortion-funding opinions to uphold laws that in no plausible sense fit the notion of inaction or omission, no matter how one slices the relevant time period or the government program in question. Citing the absence of an “undue burden” in the abortion-funding cases, the Court rejected challenges first to *criminal provisions prohibiting* public employees from performing non-lifesaving abortions⁸⁶ and then to all *active abortion restrictions* that fall short of an absolute prohibition or a requirement of third-party involvement in the decision.⁸⁷ In fact, in *Planned Parenthood of Southeastern Pennsylvania v.*

Appleton, *When Welfare Reforms Promote Abortion: “Personal Responsibility,” “Family Values,” and the Right to Choose*, 85 GEO. L.J. 155 (1996). Already, such plans have earned judicial approval based on the abortion-funding cases’ concept of inaction. Although those targeted by these laws have the right to have (more) children, the government has no affirmative obligation to subsidize such procreative choices. See *C.K. v. Shalala*, 883 F. Supp. 991, 1015 (D.N.J. 1995), *aff’d sub nom. C.K. v. New Jersey Dep’t of Health & Human Servs.*, 92 F.3d 171 (3d Cir. 1996).

83. See *supra* notes 52-53 and accompanying text.

84. This answer still leaves room for questions about the respective roles of federal and state funds under the cooperative venture known as Medicaid, but such questions do not implicate hundreds of “inactors.”

Under current interpretations of the law, states have the authority to subsidize a larger class of abortions than those supported by federal funds, but states cannot subsidize a smaller class without jeopardizing their participation in the Medicaid program. Thus, if Congress currently provides funds not just for life-saving abortions, but also for abortions in pregnancies caused by rape or incest, states participating in Medicaid cannot make their funds available only for life-saving abortions. See, e.g., *Planned Parenthood Affiliates of Mich. v. Engler*, 73 F.3d 634, 638 (6th Cir. 1996); *Hern v. Beye*, 57 F.3d 906, 911-12 (10th Cir. 1995). *But cf. Dalton v. Little Rock Family Planning Servs.*, 116 S. Ct. 1063, 1064 (1996) (per curiam) (accepting, without deciding, this interpretation of Hyde Amendment).

85. See *Maher v. Roe*, 432 U.S. 464, 468, 478-79 (1977).

86. See *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 507 (1989). The Court acknowledged that these restrictions covered abortions even for patients who would pay, so the question was not simply one of a “passive” state failure to subsidize. See *id.* at 511 (the abortion-funding cases “support the view that the State need not commit any resources to facilitating abortions, even if it can turn a profit by doing so.”) See also *Bandes, supra* note 62, at 2297-308.

87. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 881-87 (1992) (upholding detailed informed-consent and waiting-period requirements because they do not impose an undue burden). Although citing the abortion-funding cases as a source of this undue burden test, see *id.* at 875, 876, the Justices writing the joint opinion made no effort to clothe their version of the test in the language of “inaction” or “omission.”

Casey, the joint opinion announced that the undue burden test, originally derived from the Court's analysis of the "passive" nonsubsidies in the abortion-funding cases, would henceforth govern *all* pre-viability restrictions on abortion, active and passive alike.⁸⁸

B. Samaritanism and Abortion Rights

While the abortion-funding cases and their aftermath show how the notion of an omission has been stretched to limit reproductive freedom, there is also evidence that the Court has used the concept narrowly even though a broader reading might reinforce such freedom. Even before *Roe v. Wade*, one line of attack against abortion restrictions explained that such restrictions amount to an exceptional "Good Samaritan" requirement for pregnant women.⁸⁹ This argument rests on the premise that, in effect, an abortion constitutes an omission—a failure to provide assistance to the fetus. For its proponents, one of the strengths of this argument is the irrelevance of the legal status of the fetus: the omission-duty principle permits most inactions even if they result in the death of another person.⁹⁰ Yet, despite the enduring appeal of this argument, which has been called the best argument for abortion freedom,⁹¹ the Supreme Court has never explicitly invoked it to shore up the much disputed constitutional protection found in privacy and liberty.⁹²

Now it is true that an abortion does not look like an omission, given the physician's active intervention as well as the patient's initial efforts to solicit

88. See *id.* at 876 ("In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.")

89. See Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFFAIRS 47, 63 (1971). See also Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979) (post-*Roe* elaboration of Thomson's analysis).

90. See, e.g., Suzanna Sherry, *Woman's Virtue*, 63 TUL. L. REV. 1591, 1593 (1989) (Thomson's approach provides the best argument for abortion freedom because it reveals the real question: whether pregnant women may be compelled to provide aid without which the fetus will die).

91. See *id.*

92. Among the many attacks on *Roe*'s analysis, see John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159. *Casey*, however, does contain some language that might suggest the samaritan approach: The Court's opinion noted that the values at stake include "personal autonomy and bodily integrity," *Casey*, 505 U.S. at 857, and Justice Blackmun wrote:

A State's restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality. . . . By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course.

Id. at 928 (Blackmun, J., concurring in part, concurring in the judgment in part and dissenting in part).

such medical treatment. Yet Judith Jarvis Thomson's classic analogy makes the case: just as our law would not require one to remain "plugged in" to an ailing violinist even if that were the only way to save his life, so too the law should not single out pregnant women as the only class of persons required not just to summon aid for another, but also to provide the aid themselves over a nine-month period at the expense of their own physical integrity and quite possibly their health as well.⁹³

If "pulling the plug" on the fetus—or the violinist—*still* seems not to merit legal classification as an omission, then return to developments in the "right to die" area. Over twenty years ago, Glanville Williams recommended relying on "the concept of omission" to justify "switching off [a modern] respirator," based on the functional equivalence of such conduct and the doctor's failure to continue turning a handle that operates an imaginary, much more primitive respirator.⁹⁴ In *Barber v. Superior Court*,⁹⁵ the California Court of Appeal followed Williams' analogy almost step-by-step to conclude that "the cessation of 'heroic' life support measures is not an affirmative act but rather . . . [an] omission of further treatment."⁹⁶ Later, the United States Supreme Court implicitly adopted the same approach in its first "right to die" case, *Cruzan v. Director, Missouri Department of Health*,⁹⁷ by failing to differentiate between refusals to begin treatment and withdrawals of treatment already begun.⁹⁸ And in *Quill*, the Court goes further, indicating

93. See Thomson, *supra* note 89.

94. See Glanville Williams, *Euthanasia*, 41 MEDICO-LEGAL J. 14, 21 (1973):

The proposition that switching off the respirator should be regarded as an omission may be proved as follows. Suppose that the respirator worked only as long as the doctor turned a handle. Then, if he stopped turning, he would thereafter be regarded merely as omitting. Suppose, alternatively, that the respirator worked electrically but was made to shut itself off every 24 hours. Then the deliberate failure to restart it would again be an omission. It can make no moral difference that the respirator is constructed to run continuously and has to be stopped. Stopping the respirator is not a positive act of killing the patient, but a decision not to strive any longer to save him.

95. 195 Cal. Rptr. 484 (Ct. App. 1983).

96. *Id.* at 490.

97. 497 U.S. 261 (1990).

98. In *Cruzan*, the Court "assume[d] that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition," *id.* at 279, and then proceeded to analyze the extent to which an incompetent person has the same right. See *id.* The facts in the case, however, centered on the *withdrawal* of treatment that had already begun, but the Court's emphasis on *refusal* of treatment was broad enough to encompass both withdrawal and the failure to begin treatment in the first place. See *id.*

There are important policy reasons why the law attaches the same consequences to (active) withdrawals of artificial life support as it attaches to (passive) failures to begin such treatment in the first place. If the law were to protect patient choice in the latter, but not in the former, patients or their families might be afraid to begin such measures, given the uncertainty of full recovery. See *id.* at 314 (Brennan, J., dissenting). See also, e.g., *In re Conroy*, 486 A.2d 1209, 1234 (N.J. 1985) (citing Lynn & Childress, *Must Patients Always Be Given Food and Water?*, 13 HASTINGS CTR. REP. 17, 19-20

that terminations of artificial life support—actions “pulling the plug”—are a means of “letting die” and suggesting that such actions are properly treated as the law traditionally has treated omissions.⁹⁹

One can legitimately wonder why the Court has avoided the very same reasoning in the abortion context. Although many grounds remain for questioning whether it makes sense to regard an abortion as an omission,¹⁰⁰ the same questions must arise for terminations of artificial life support that have already begun.¹⁰¹ Like *Glucksberg*, *Quill* has interesting, and not entirely reassuring, implications for abortion rights.

(1983)).

99. See, e.g., *Vacco v. Quill*, 117 S. Ct. 2293, 2298 (1997) (treating as equivalent “a physician who withdraws, or honors a patient’s refusal to begin, life-sustaining medical treatment. . .”). See also *id.* at 2300 (noting similar approach by state legislatures). *Quill*’s analysis thus perpetuates the action-omission distinction, even while avoiding the traditional terminology. Cf. *supra* note 63.

100. For example, considering abortion as a samaritan issue would have linked abortion to a morally questionable rule. See *Law*, *supra* note 15, at 1022-23. Further, this approach would provide no basis for guaranteeing abortions for poor women. See *Regan*, *supra* note 89, at 1644-45 (this argument does not extend to assistance for abortions). Of course, the Court’s right-to-privacy approach also failed to guarantee abortions for poor women. See *supra* notes 64-72 and accompanying text. On the other hand, because the samaritan argument for abortion freedom rests, at bottom, on an equal protection foundation (pregnant women alone must serve as Good Samaritans), this approach might well strengthen the case for requiring abortion funding when assistance is provided for virtually all other medical care. See *Ginsburg*, *supra* note 15, at 385. See also EILEEN L. MCDONAGH, *BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT* (1996) (arguing that the samaritan analogy compels the state to subsidize abortions).

101. Readers unfamiliar with the writings of Thomson and Regan, *supra* note 89, will challenge the samaritan approach to abortion on any number of counts. Yet each of these obvious difficulties is acknowledged and addressed in a sufficiently thoughtful, if not an entirely unassailable, manner to prevent outright dismissal of the approach.

For example, Regan concedes how hard it is to think of an abortion as an omission. *Regan*, *supra* note 89, at 1574-75, 1578-79. Of course, the examination of the *Barber* case (*supra* notes 95-96 and accompanying text), decided well after the publication of Thomson’s and Regan’s articles, lends support to the idea that “pulling the plug” constitutes an omission, regardless of context. Yet, the removal of life support purportedly allows “nature to take its course,” with the patient’s death as a likely result. When “nature takes its course” in a pregnancy, however, the pregnancy usually continues, with childbirth as the likely result. On the other hand, the death following the removal of life support typically results from asphyxiation, starvation, or dehydration. How does that differ from an abortion, which also deprives the fetus of elements essential for survival? In the alternative, Regan compares abortion to justified self-defense. See *Regan*, *supra* note 89, at 1611-18.

Thomson addresses a second obvious challenge, the woman’s role in creating the pregnancy. See Thomson, *supra* note 89, at 57-59. She discusses cases of rape and failed birth control to conclude that at least in some situations abortion is not an unjust killing. See *id.* She leaves open the question of precisely what situations ought to be covered by the argument. See *id.* Regan explains how the woman’s conduct leaves the fetus “no worse off,” in an effort to address this problem. See *Regan*, *supra* note 89, at 1598-603.

Regan responds to still another problem that critics typically cite, the special parent-child duty. See *id.* at 1593-98. He points out, first, how parents have the option of relieving themselves of the burdens of parenthood (say, by relinquishing the child for adoption) and, second, how the physical burdens of pregnancy exceed significantly what the law requires under any recognized legal duty. See *id.*

III. CONTINUING THE DIALOGUE—BUT WHERE?

In rejecting the constitutional challenges in both *Glucksberg* and *Quill*, the Court remits the question of assisted suicide to legislative resolution. At the end of the majority opinion in *Glucksberg*, the Court observes that “[t]hroughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide.”¹⁰² The Court then expresses hope that this debate will continue, as it “should in a democratic society.”¹⁰³

Although the *Glucksberg* majority does not say so, in the process that the Court might imagine, each state will experiment with different approaches to the difficult issue of assisted suicide. The concurring Justices explicitly contemplate continuing experimentation within the fifty states, with Justice Souter expressing hope that “such experimentation will be attempted in some of the States”¹⁰⁴ and Justice O’Connor writing, as she did in *Cruzan*, that “the . . . challenging task of crafting appropriate procedures for safeguarding . . . liberty interests is entrusted to the “laboratory” of the States . . . in the first instance.”¹⁰⁵ Some of the Justices have, in parallel fashion, expressly urged state-by-state consideration of reproductive rights, should the Court decide to overturn or limit the constitutional protection announced in *Roe v. Wade*.¹⁰⁶

Yet, as a close reading of the opinion reveals, the *Glucksberg* majority in fact says nothing explicitly about the *states* when it decides that assisted suicide should remain a legislative question.¹⁰⁷ Could the ambiguity in the

102. *Washington v. Glucksberg*, 117 S. Ct. 2258, 2275 (1997).

103. *Id.*

104. *Id.* at 2293 (Souter, J., concurring) (“There is, indeed, good reason to suppose that in the absence of a judgment for respondents here, just such experimentation will be attempted in some of the States [citing proposed state statutes in Brief for State Legislators as Amici Curiae].”).

105. *Id.* at 2303 (O’Connor, J., concurring) (quoting *Cruzan v. Director, Missouri Dep’t of Health*, 497 U.S. 261, 292 (1990) (O’Connor, J., concurring) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932))).

106. *See, e.g., Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 966 (1992) (Rehnquist, C.J., concurring in part and dissenting in part) (“A woman’s interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest.”); *id.* at 979 (Scalia, J., concurring in part and dissenting in part) (“The States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so.”); *Doe v. Bolton*, 410 U.S. 179, 222 (1973) (White, J., dissenting) (“The upshot [of *Roe* and *Doe*] is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand.”).

107. The majority simply writes: “Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.” *Glucksberg*, 117 S. Ct. at

Court's language mean the Justices contemplated another possibility: *federal* legislation?

Increasingly, Congress is enacting federal legislation that addresses matters of family, health, and welfare—traditionally the prerogative of each state. Congress has proceeded to exercise control over these areas in two different ways. First, Congress has conditioned funds that it provides to the states for particular programs on the states' compliance with federal requirements.¹⁰⁸ Examples include many child-support laws that each state must adopt in order to receive funds under such legislation as the Child Support Enforcement Act of 1984,¹⁰⁹ the Family Support Act of 1988,¹¹⁰ and most recently the Personal Responsibility and Work Opportunity Reconciliation Act of 1996—"welfare reform."¹¹¹ The resulting federalization of family law significantly undercuts the traditional view that the "whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States."¹¹² This approach reflects even more federal intervention than those programs in which Congress purports simply to limit the purposes for which states can use federal funds.¹¹³ In the "conditional-funding" developments cited here, by contrast, Congress is imposing affirmative requirements that states must meet to remain eligible for particular federal funds, in effect,

2275. In *Vacco v. Quill*, 117 S. Ct. 2293 (1997), the majority upholds New York's legislative classification without addressing the larger issues examined in *Glucksberg*.

108. See Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995); Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103 (1987).

109. 42 U.S.C. § 654 (1982 & Supp. 1986) (establishment of enforcement procedures).

110. 42 U.S.C. § 667(a)-(b) (1994) (by 1987, states must use child support guidelines as rebuttable presumptions in Title IV-D cases, those in which the state seeks to recover from an absent parents payments made to support a needy child).

111. 42 U.S.C.A. § 666(f) (West Supp. 1997) (each state must adopt Uniform Interstate Family Support Act by January 1, 1998). The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 also promises financial rewards for states that achieve certain federally specified objectives. See, e.g., *id.* at § 403(a)(4) (bonuses for decreasing illegitimacy).

112. *In re Burrus*, 136 U.S. 586, 593-94 (1890). See *Ankenbrandt v. Richards*, 504 U.S. 689 (1992). Compare Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073 (1994), with Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787 (1995).

113. Essentially, Congress has used the same approach with the states that the government (both state and federal) has used with individuals in the abortion-funding cases. See *supra* note 64 and accompanying text. Under this approach, as it has been interpreted by the Supreme Court, Congress subsidizes the programs it chooses to support but provides no funding for other programs. See *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) ("when the Government appropriates public funds to establish a program it is entitled to define the limits of that program"). See also *supra* note 82. Congress has begun to use the "abortion-funding approach" in the "right to die" arena, for example, enacting measures that disallow the use of federal funds for suicide assistance, even if permitted by the states. See Federal Assisted Suicide Funding Restriction Act of 1997, Pub. L. 105-12, 111 Stat. 23 (codified at 42 U.S.C. § 14401 et seq.), cited in *Washington v. Glucksberg*, 117 S. Ct. 2258, 2266 (1997).

controlling indirectly state prerogatives that it could not control directly.¹¹⁴

Second, Congress has invoked its power under the Commerce Clause to legislate in areas that the states traditionally controlled. For example, in the Child Support Recovery Act,¹¹⁵ Congress has made the willful failure to pay a past-due support obligation for a child who resides in another state a federal crime. Most courts have upheld the statute against challenges that it exceeds Congress' authority.¹¹⁶ According to these courts, payment (or nonpayment) of a debt constitutes economic activity, and the difference in location of obligor and obligee requires satisfaction of the debt by interstate means.¹¹⁷ The result is a valid federal family law, which requires federal courts to address family-law problems typically outside federal authority.¹¹⁸ Perhaps the *Glucksberg* majority's silence about precisely which legislature(s) should attempt to address assisted suicide signals the Court's openness to a federal forum for the continuing debate and, ultimately, a federal resolution. Notwithstanding the Supreme Court's recognition in *United States v. Lopez*¹¹⁹ of the limits of Congress' authority under the Commerce Clause,¹²⁰

114. See Baker, *supra* note 108, at 1916 & n.16 (distinguishing "reimbursement spending" from "regulatory spending"). See generally Rosenthal, *supra* note 108, at 1110, 1133-42.

115. 18 U.S.C. § 228 (1994).

116. See, e.g., *United States v. Hampshire*, 95 F.3d 999 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 753 (1997); *United States v. Mussari*, 95 F.3d 787 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1567 (1997); *United States v. Sage*, 92 F.3d 101 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 784 (1997). See generally Jeanne M. Tanner, Comment, *Constitutionality of the Child Support Recovery Act in the Wake of United States v. Lopez*, 5 GEO. MASON L. REV. 267 (1997).

117. But see *United States v. Bailey*, 902 F. Supp. 727 (W.D. Tex. 1995), *rev'd*, 115 F.3d 1222 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 866 (1998).

118. See *Bailey*, 902 F. Supp. at 729, 730.

119. 514 U.S. 549 (1995) (federal Gun Free School Zones Act exceeds Congress' authority under the Commerce Clause). The Court determined that the conduct covered by the Act did not constitute economic activity that, in aggregation with similar activity, could affect interstate commerce. See *id.* at 559-61. Further, Congress included in the statute no jurisdictional element that ensures an effect on interstate commerce. See *id.* at 561-63.

120. Congress' authority to enact laws on assisted suicide might, in theory, also rest on section 5 of the Fourteenth Amendment, which gives Congress the power to enforce the due process and equal protection guarantees. A majority of the Justices expressly recognize that Fourteenth Amendment interests are at stake in *Glucksberg* and *Quill*, even if those interests are not "fundamental" and the state's countervailing interests should prevail in the instant challenges. See, e.g., *Washington v. Glucksberg*, 117 S. Ct. 2258, 2290 (1997) (Souter, J., concurring) (stating that liberty interests at stake demand careful scrutiny but there is no need now to decide whether they are fundamental); see *id.* at 2303 (O'Connor, J., joined by Ginsburg, J., concurring) (stating that there is no need to address question whether competent, suffering person has constitutionally cognizable interest in controlling circumstances of imminent death); see *id.* at 2307 (Stevens, J., concurring) (stating that "some individuals who no longer have the option of deciding whether to live or to die because they are already on the threshold of death have a constitutionally protected interest that may outweigh the State's interest in preserving life at all costs"); *id.* at 2311 (Breyer, J., concurring) (stating that our legal traditions may provide greater support for a specially protected liberty interest in "personal control over the manner of death, professional medical assistance, and the avoidance of unnecessary

it is not difficult to imagine a federal code of assisted suicide emerging from Dr. Jack Kevorkian's ability to attract to Michigan "patients" from across the United States, especially if he charges fees for his services!¹²¹

To the extent the Court gives its implicit blessing to a federal legislative resolution of the assisted suicide debate, it also suggests a similar direction for the regulation of abortion and other matters of reproduction. In the federal bills that would ban certain late-term abortions, Congress has based its authority to legislate on the premise that abortion services constitute interstate commerce.¹²² Certainly, if the Commerce Clause gives Congress the authority to address not only violence at abortion clinics,¹²³ but also a particular abortion procedure, then Congress can address as well *all* abortion procedures and also can legislate matters such as abortion waiting periods,

and severe physical suffering—combined.”)

Nonetheless, this foundation for federal legislation on assisted suicide (and, by analogy, some reproductive matters) is vulnerable, given the limits on Congress' authority to enforce the Fourteenth Amendment, as the Court recently has articulated these limits. In invalidating the Religious Freedom Restoration Act for exceeding Congress' power under section 5 of the Fourteenth Amendment, a majority of the Court stated that section 5 allows Congress to enact “measures that remedy or prevent unconstitutional actions [not] measures that make a substantive change in the governing law. . . .” *City of Boerne v. Flores*, 117 S. Ct. 2157, 2164 (1997). Based on what the Supreme Court already has said about the constitutional status of assisted suicide (and abortion), some imaginable federal legislative efforts might well exceed these limits. *Cf.* Human Life Bill, S. 158, 97th Cong., 1st Sess. (1981) (finding human life exists at conception and Fourteenth Amendment was intended to protect all human beings); Freedom of Choice Act, S. 25, 103d Cong., 1st Sess. (1993) (codifying *Roe v. Wade's* strict scrutiny for abortion restrictions). True, there are also limits on Congress' commerce power, as *Lopez* recognizes. *See supra* note 119. Yet the requirements that the Court demands for the exercise this authority would seem easily satisfied in the context of assisted suicide and reproductive health care. *See infra* notes 121-26 and accompanying text.

121. *See, e.g., Kevorkian Is Questioned in Two More Suicides*, N.Y. TIMES, Dec. 28, 1997, § 1, at 14 (reporting deaths in Michigan of a man from Pennsylvania and a woman from Florida); *Kevorkian Deaths Total 100*, N.Y. TIMES, Mar. 14, 1998, § 1, at 18. *See also In re Christine Busalacchi*, No. 59582, 1991 WL 10048 (Mo. Ct. App. Jan. 18, 1991) (enjoining father, who desires to remove daughter's feeding tube, from moving her to a more permissive state); Lea Brilmayer, *Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die*, 91 MICH. L. REV. 873 (1993); Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451 (1992). Even if these “patients” do not always pay the doctor, their use of hotel, hospital, and morgue services should provide sufficient economic activity. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

122. *See The Partial-Birth Abortion Ban Act of 1997*, S. 6, 105th Cong., 1st Sess. (1997).

123. *See The Freedom of Access to Clinic Entrances Act*, 18 U.S.C. § 248 (1994). The federal courts of appeals have upheld the statute as a valid exercise of Congress' commerce power, even after *Lopez*. *See, e.g., United States v. Wilson*, 73 F.3d 675 (7th Cir. 1995), *cert. denied*, 117 S. Ct. 47 (1996); *Cheffner v. Reno*, 55 F.3d 1517 (11th Cir. 1995). *See also American Life League, Inc. v. Reno*, 47 F.3d 642 (4th Cir.), *cert. denied*, 516 U.S. 809 (1995) (pre-*Lopez* case, with post-*Lopez* denial of certiorari). *See generally* Amy H. Nemko, Case Note, *Saving FACE: Clinic Access Under a New Commerce Clause*, 106 YALE L.J. 525 (1996); Benjamin W. Roberson, Note, *Abortion as Commerce: The Impact of United States v. Lopez on the Freedom of Access to Clinic Entrances Act of 1994*, 50 VAND. L. REV. 239, 258-59 (1997).

mandated preabortion information, parental-consent and notification rules, and similar requirements.¹²⁴ Under this reasoning, federal authority would also reach other reproductive services, such as assisted conception.¹²⁵ A federal code of human reproduction might plausibly result from this Commerce-Clause approach.¹²⁶ The emergence of RU-486, the French "abortion pill," reinforces the growing federalization of the substantive law of reproduction, with the Food and Drug Administration controlling the medication's availability for use¹²⁷ and hence determining the permissibility of nonsurgical abortions.

Federal abortion laws might be more restrictive or more permissive than their state counterparts. And, of course, the constitutional limits on how far government can intrude in such protected choices, articulated in *Roe* and *Casey*, constrain federal and state legislatures alike.¹²⁸ Further, the prospect of conflicting or overlapping laws raises a host of questions about preemption, supremacy, and federalism. For example, once federal authorities give final approval for doctors to prescribe RU-486, can states prohibit the medication's use¹²⁹ for the purpose of advancing state interests

124. There is evidence that state measures of this sort induce women to seek abortions in more permissive states. *See, e.g.*, Robert H. Mnookin, *Bellotti v. Baird: A Hard Case*, in *IN THE INTEREST OF CHILDREN* 149, 242 (1985) (decrease in abortions in states with parental involvement requirements may result from minors' traveling to other states to avoid requirements). *See also* *Doe v. Bolton*, 410 U.S. 179, 200 (1973) (holding unconstitutional Georgia's residency requirement for abortions).

125. Many proposals are pending in Congress to prohibit human cloning. *See, e.g.*, Human Cloning Prohibition Act, S. 1601, 105th Cong., 2d Sess. (1998). The Senate voted down one such measure, but not on grounds that it would exceed Congress' authority. *See* Lizette Alvarez, *Senate, 54-42, Rejects Republican Bill to Ban Human Cloning*, N.Y. TIMES, Feb. 12, 1998, at A18. Other bills would simply prohibit the use of federal funds for human cloning research. *See, e.g.*, S. 368, 105th Cong., 1st Sess. (1997).

In addition, federal law now requires assisted reproductive technologies programs to report their pregnancy rates to the Department of Health and Human Services for annual publication and distribution to the public. *See* 42 U.S.C. §§ 263a-1 - 263a-7 (1994).

126. *Cf.* *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 1002 (1992) (Scalia, J., concurring in part and dissenting in part) (condemning Court's imposition of "a rigid national [abortion] rule instead of allowing for regional differences"). This development would not be something new: Recall the early restrictions on abortion and contraception in the federal Comstock Law. *See* MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 176, 187 (1985).

127. In 1996, the FDA conditionally approved RU-486 as safe and effective. *See* Gina Kolata, *Pill for Abortion Clears Big Hurdle to its Sale in U.S.*, N.Y. TIMES, Sept. 19, 1996, at A1.

128. For example, the standards that federal courts have invoked to strike down state bans on late-term abortions would also apply to a federal ban, should one ever become law. *See, e.g.*, *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997), *cert. denied*, 1998 U.S. LEXIS 1785 (U.S. 1998); *Carhart v. Stenberg*, 972 F. Supp. 507 (D. Neb. 1997); *Evans v. Kelley*, 977 F. Supp. 1283 (E.D. Mich. 1997).

129. This is the mirror-image of the struggle between Oregon and federal authorities over the permissibility of physician-assisted suicide: Already, Oregon voters' decision to permit assisted suicide has raised the question whether *federal authorities* can prohibit conduct that the state permits.

that the Court previously deemed legitimate reasons for restricting abortion?¹³⁰ But apart from these jurisprudential considerations, relocating the “dialogue” on abortion restrictions and other reproductive choices from state legislatures to Congress is sure to affect both the politics surrounding these difficult topics and the resulting law.

The *Glucksberg* majority’s silence about the appropriate forum for continued dialogue on assisted suicide arguably signals that the Court is prepared to accept a national legislative standard to resolve this divisive issue. Feminists and other strategists for reproductive freedom should heed this silence, while preparing to fight their battles not just in state legislatures, but in Congress as well.

See, e.g., Justice Dept. Bars Punishing Oregon Doctors Aiding Suicides, N.Y. TIMES, Jan. 24, 1998, at A7. By contrast, the question raised in text hypothesizes a state effort to restrict what federal authorities permit. *See Griswold v. Connecticut*, 381 U.S. 479 (1965), could have presented a scenario for a similar question (state law prohibits use of drugs and devices that have federal approval).

130. *Casey* recognizes the woman’s health and fetal protection as legitimate state interests that support pre-viability abortion restrictions, so long as those restrictions fall short of undue burdens. *See* 505 U.S. at 870-78.