

CAN THE RIGHT TO AUTONOMY BE RESUSCITATED AFTER *GLUCKSBERG*?

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INTRODUCTION

The concept of autonomy animates contemporary political and legal theory. While support wanes for traditional elements of modern liberalism such as welfare and criminal rights, enthusiasm persists for individual autonomy in matters of personal morality.¹ The United States Supreme Court, for example, has grounded a right to abortion on autonomy,² and federal appellate jurists have justified a right to assisted suicide on this principle.³ Surprisingly then in *Washington v. Glucksberg*, the Supreme Court rejected the rights' claim for assisted suicide premised on autonomy.⁴ *Glucksberg* is remarkable—and problematic—precisely because the Court previously had never rejected a claim that, by the Court's own admission, was so integral to autonomy.⁵

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1. See Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 876 (1994) (claiming that "autonomy holds unique promise to function as the constitutional value of values"); Thomas Morawetz, *Liberalism and the New Skeptics*, in IN HARM'S WAY: ESSAYS IN HONOR OF JOEL FEINBERG 122 (Jules Coleman and Allen Buchanan eds., 1994) ("The concept of autonomy is the bulwark of liberal theory in politics and law.").

2. In the key passage of *Planned Parenthood v. Casey*, the Supreme Court claimed: "These matters [marriage, procreation, and family relationships], 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." 505 U.S. 833, 851 (1992).

3. See *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1459-60 (W.D. Wash. 1994) ("Like the abortion decision, the decision of a terminally ill person to end his or her life . . . constitutes a choice central to personal dignity and autonomy."). See *Compassion in Dying v. Washington*, 79 F.3d 790, 813-14 (9th Cir. 1996) (en banc), for a nearly identical quotation of *Planned Parenthood v. Casey* to justify a right to assisted suicide.

4. 117 S. Ct. 2258 (1997).

5. *Id.* at 2270. The Court did deny a right to homosexual sodomy in *Bowers v. Hardwick*, which many would consider an act important to autonomy, but in

This article examines the Court's rejection of the autonomy-based right to assisted suicide in *Glucksberg* against the matrix of its historical affirmation of the right to autonomy. Our discussion reveals that the Court could deny the constitutional right to autonomy in *Glucksberg* only by imposing an axiology. More importantly, the article also posits that the Court's concept of personal autonomy is inextricably linked to moral theory, which imperils several fundamental tenets of contemporary jurisprudence. This article probes, first, four different interpretations of autonomy and the United States Supreme Court's historical use of the term; second, the ethical basis underlying the right to autonomy rejected in *Glucksberg*;⁶ and third, the threat that the *Glucksberg* analysis poses to the practice of judicial review. We also consider the Court's determination not to review the decision in *Lee v. Oregon*,⁷ which upheld an Oregon statute permitting physician-assisted suicide. This article examines how the Court can simultaneously allow one state to legalize and another to proscribe assisted suicide, particularly when fundamental rights are implicated. It concludes that the Court, in denying a right of autonomy to assisted suicide in *Glucksberg*, adopted an axiology that allowed it to impose its own moral view of the good in contravention to contemporary notions of jurisprudence and of the Constitution.

I. THE BACKGROUND TO *GLUCKSBERG*

This Part provides the background for the Supreme Court's treatment of autonomy in *Glucksberg*. The Court has employed the concept of autonomy to justify both political self-government and individual rights. The discussion contrasts these two senses

distinction to *Glucksberg*, the majority addressed the question of whether the Constitution confers a right to homosexual sodomy rather than to autonomy. 478 U.S. 186, 190 (1986) ("The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy. . ."). See Lawrence H. Tribe and Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1066 (1990), for an insightful analysis of the legal and moral presuppositions that govern the level of generality in the specification of a rights' claim.

6. This article uses the terms "ethical" and "moral" interchangeably, in contrast to the distinctions that some philosophers make.

7. 891 F. Supp. 1429 (D. Or. 1995), *vacated for lack of jurisdiction*, 107 F.3d 1382 (9th Cir. 1997), and *cert. denied*, *Lee v. Harclerod*, 118 S. Ct. 328 (1997).

of autonomy as they appear in contemporary scholarship and constitutional law and adumbrates our analysis of states' rights in Part III. Part I.A. differentiates the manifold senses of autonomy, while Part I.B. traces the historical evolution of the right to autonomy through *Planned Parenthood v. Casey*.

A. *The Meaning of Autonomy*

Scholars in disciplines as diverse as ethics, political philosophy, and law employ the concept of autonomy in myriad ways. This section distinguishes the legal sense of this protean concept from related but divergent senses to establish the Supreme Court's meaning of this term.

The word "autonomy" is derived etymologically from the Greek words *auto* and *nomos*, meaning self-governing or self-legislating. It was ascribed to Greek city-states and other political entities that were free to frame their own laws, in contrast to states subjugated to the governance of a foreign power.⁸ Thus, autonomy originally described polities, rather than individuals, that enjoyed the freedom of self-rule.⁹

The term was not employed in any large measure in the Western intellectual tradition until Immanuel Kant grounded his moral theory on autonomy in the late eighteenth century. For Kant, the individual moral agent retains autonomy in a physically deterministic world by his or her ability to propose moral laws for himself or herself.¹⁰ Although it establishes a domain of freedom, Kantian autonomy is not license because individual

8. See C.S. LEWIS, *STUDIES IN WORDS* 124-25 (1961).

9. See JOEL FEINBERG, *HARM TO SELF* 46-77 (1986). Feinberg attempts to distinguish between an autonomous and sovereign state, but his distinction falls prey to his selective choice of polities that are putatively autonomous but not sovereign. Hence, one can deny that the polities that Feinberg identifies as autonomous but not sovereign, such as West Bank Palestinians, are in fact autonomous.

10. See IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 67 (Lewis White Beck trans., 1975):

We have finally reduced the definite concept of morality to the idea of freedom, but we could not prove freedom to be real in ourselves and in human nature. We saw only that we must presuppose it if we would think of a being as rational and conscious of its causality with respect to actions, that is, as endowed with a will; and so we find that on the very same grounds we must ascribe to each being endowed with reason and will the property of determining himself to action under the Idea of his freedom.

Id.

choice is circumscribed by categorical¹¹ and hypothetical¹² imperatives such as the requisite of universality: a moral agent can act only on those principles he could will for all mankind, that is, he cannot lie or steal if he could not will these acts for everyone.¹³ These stipulations, as well as its focus on individuals rather than states,¹⁴ distinguish Kantian from Greek autonomy.

Probative criticisms of Kant's theory by John Stuart Mill¹⁵ in the nineteenth century led many philosophers to abandon Kant's moral theory, and, until relatively recently, the concept of autonomy was discussed predominantly in Kantian circles. In the last quarter century, Western intellectuals have reappropriated the term, though the "scholars of autonomy" concentrate on different aspects of the term than do ethicists and legal scholars. Scholars of autonomy use the term descriptively to articulate the features of human action that render an agent self-governing.¹⁶ Some autonomy scholars analyze specific situations to determine which external factors facilitate or impede self-governance—for example, whether surrendering one's money to an armed assailant is a self-governed act¹⁷—while others focus on the qualities that an agent must possess to act freely, such as authen-

11. See *id.* at 31 (saying that a categorical imperative commands an action "as good in itself, and hence as necessary in a will which of itself conforms to reason as the principle of this will").

12. See *id.* (stating that a hypothetical imperative commands one "as a means to achieving something else which one desires").

13. See *id.* at 67 ("From presupposing this idea [of freedom] there followed also the consciousness of a law of action: that the subjective principles of actions, i.e., maxims, in every instance must be so chosen that they can hold also as objective, i.e., universal principles, and can thus serve as principles for the universal laws we give.").

14. See IMMANUEL KANT, *THE METAPHYSICAL PRINCIPLES OF VIRTUE* (James Ellington trans., 1964), for Kant's ultimately unsuccessful attempt to graft his moral theory to a political philosophy.

15. JOHN STUART MILL, *Utilitarianism*, reprinted in *UTILITARIANISM, LIBERTY, REPRESENTATIVE GOVERNMENT* 4 (H.B. Acton ed., 1972).

16. See FEINBERG, *supra* note 9, at ch. 18; WILLIAM E. CONNOLLY, *THE TERMS OF POLITICAL DISCOURSE* 14 (2d ed. 1983); GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* (1988); JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986); Fallon, *supra* note 1, at 879-90.

17. Among many, see Richard J. Arneson, *Autonomy and Preference Formation*, in *IN HARM'S WAY: ESSAYS IN HONOR OF JOEL FEINBERG* 42-75 (Jules Coleman & Allen Buchanan eds., 1994); JOHN HARRIS, *THE VALUE OF LIFE* 194-204 (1985); Irving Thalberg, *Hierarchical Analyses of Unfree Acts*, in *THE INNER CITADEL: ESSAYS ON INDIVIDUAL AUTONOMY* 123-36 (John Christman ed., 1989); Susan Wolf, *Sanity and the Metaphysics of Responsibility*, in *THE INNER CITADEL: ESSAYS ON INDIVIDUAL AUTONOMY* 137-51 (John Christman ed., 1989).

ticity,¹⁸ self-control,¹⁹ self-creation,²⁰ self-critical ability,²¹ self-reliance, initiative, and responsibility.²²

Although scholars of autonomy illuminate the components of a freely chosen act, their descriptive notion of autonomy is only marginally useful to jurisprudence. By clarifying the requisites of an autonomous agent, these scholars provide general criteria that confirm legal or moral responsibility for an act, but they cannot establish the legitimacy of the act because the descriptive sense of autonomy is bereft of normativity. By definition, descriptive autonomy merely describes the manner in which a person acted, for example, with authenticity or self-control, without specifying the moral or legal character of the act.²³ Hence, the various characteristics scholars identify with autonomy fail to distinguish between legitimate and heinous acts: the depravity of a murder is not mitigated if the killer fulfills all of the criteria of autonomy; in fact, immoral acts seem even more invidious if the agent acts with perfect autonomy.²⁴ Similarly, whether an agent retains self-control when submitting to a euthanizing act does not establish a right to the act. The crux of a rights' claim, such as that to assisted suicide, is whether the disputed act is just according to the terms of the Constitution.²⁵ Whether it is performed or suffered with self-control is a separate concern. Thus, the descriptive notion of autonomy is insufficient for application to legal rights' claims.

18. See Gerald Dworkin, in *THE INNER CITADEL: ESSAYS ON INDIVIDUAL AUTONOMY* 61 (John Christman ed., 1989).

19. See JOEL FEINBERG, *RIGHTS, JUSTICE AND THE BOUNDS OF LIBERTY* 20-21 (1980).

20. See JEAN-PAUL SARTRE, *EXISTENTIALISM* 18 (1947).

21. See Fallon, *supra* note 1, at 887-88.

22. See FEINBERG, *supra* note 9, at ch. 18, for an extensive analysis of sundry conceptions of autonomy.

23. See Dworkin, *supra* note 18, at 62. Dworkin notes that there is no specific moral content to the choices that an autonomous person makes: he might act in a praiseworthy or an invidious manner.

24. See RAZ, *supra* note 16, at 380 ("A murderer who was led to his deed by the foreseen inner logic of his autonomously chosen career is morally worse than one who murders because he momentarily succumbs to the prospect of an easy gain."). See Jeremy Waldron, *Autonomy and Perfectionism in Raz's Morality of Freedom*, 62 S. CAL. L. REV. 1097, 1127 (1989), for a conflicting but counter-intuitive view of autonomy.

25. See WILLIAM GALSTON, *JUSTICE AND THE HUMAN GOOD* 140 (1980) ("To have a right is to have a valid claim; a valid claim is based solely on reasons that prevail over all competing reason. . . . Thus a right is not a moral reason, but rather the outcome or result of moral reasons.").

Legal scholars employ autonomy in a manner discrepant from that of scholars of autonomy: they use the term ascriptive to justify an individual's moral or legal right to a particular act.²⁶ The ascriptive sense differs from the descriptive insofar as legal scholars attempt to justify the autonomy of the individual to engage in certain acts free from state strictures, rather than merely describe the human characteristics that constitute an autonomous choice.²⁷ That an individual acts autonomously in choosing suicide is a descriptive claim based on his or her mental state, choice of options, and other factors; that he or she *should* be granted a constitutional right to this act is an ascriptive and legal claim.

Thus, four distinct notions of autonomy have been developed by the ancient Greeks, Kant, autonomy scholars, and contemporary legal scholars, respectively: (1) an attribute of political entities that are free to make laws for themselves; (2) an attribute of the will of a moral agent; (3) a descriptive feature of personhood that allows a person to act freely; and (4) a principle that justifies a moral or legal right to a specific act. The Supreme Court's recent substitution of the contemporary legal sense of autonomy for the ancient Greek one will be scrutinized in Part I.B. The tension between the two, which underlies one of the most controverted aspects of constitutional law, will be probed in Part II.

B. *The Supreme Court's Transformation of Autonomy*

Until relatively recently, the United States Supreme Court rarely used the term "autonomy" to justify rights, and when it did, it usually employed the Greek sense of autonomy to recognize

26. See, e.g., Jos Welie, *The Medical Exceptions: Physicians, Euthanasia and the Dutch Criminal Law*, 17 J. MED. & PHIL. 419-34 (1992) ("Moreover, the very practice of euthanasia is usually justified in reference to the principle of autonomy: people, healthy as well as diseased, have a right to self-determination, which encompasses the right to decide about their own death."). For a similar claim, see Note, *Physician-Assisted Suicide and the Right to Die with Assistance*, 105 HARV. L. REV. 2021, 2025 (1994).

27. Some scholars have attempted to collapse the dichotomy between the descriptive and ascriptive senses of autonomy by positing a right to the features identified with autonomous action such as moral independence. See Fallon, *supra* note 1. But these attempts are subject to the criticism that Raz articulates, that depraved actions can fulfill all the criteria of autonomy but are not legally protected. See RAZ, *supra* note 16, at 380; text accompanying *supra* note 24.

the self-governing capacity of political or social entities. This section traces the evolution of the Court's historical use of the term in constitutional law and provides the backdrop against which the Court addressed autonomy in *Glucksberg*.

The Supreme Court originally employed autonomy in the Greek sense by recognizing the right of domestic polities to govern themselves. In 1868, in its first use of the term, the Court stated in *Texas v. White* that there can "be no loss of separate and independent autonomy to the States."²⁸ Similarly, in *Leser v. Garnett*, the Court asserted that changes in "the electorate . . . without the State's consent, destroys its autonomy as a political body."²⁹ Later, the Court affirmed a locality's right to self-government in educational matters in *Milliken v. Bradley*, finding that local autonomy of school districts is a vital national tradition.³⁰

The Court also ascribed a right of autonomy to Indian tribes and foreign political entities. In *The Cherokee Tobacco* cases in 1870, one Justice acknowledged tribal autonomy to "make and execute all laws for their domestic government."³¹ In *Cotton Petroleum Corp. v. New Mexico* several justices noted that "[s]tate governments and administrative officials have frequently trespassed upon the realm of tribal autonomy, presuming to govern the Indian tribes through [s]tate law or departmental regulation."³² This recognition of the Greek sense of autonomy was also extended to foreign governments. In *The Three Friends*, the Supreme Court discussed the larger autonomy and greater freedom of the Cuban people,³³ and in *Gromer v. Standard Dredging Co.*, the Court stated that the purpose of the Foraker Act was to endow Puerto Rico with local self-government and autonomy that was similar to that enjoyed by the states.³⁴ All of these uses of "autonomy" resemble the original Greek sense reserved for self-governing states.

In addition to ascribing a right of autonomy to political entities, the Supreme Court also recognized a business's right to

28. 74 U.S. 700, 725 (1868) (citing *Lane County v. Oregon*, 74 U.S. 71, 76 (1868), overruled in part by *Morgan v. United States*, 113 U.S. 476 (1885)).

29. 258 U.S. 130, 136 (1922).

30. 418 U.S. 717, 741 (1974).

31. 78 U.S. 616, 622 (1870) (Bradley, J., dissenting).

32. 490 U.S. 163, 202 (1989) (Blackmun, J., dissenting).

33. 166 U.S. 1 (1897).

34. 224 U.S. 362, 370 (1912).

autonomy as early as 1920.³⁵ Obviously the degree of self-government enjoyed by an American business, which is always balanced against state interests, is circumscribed relative to the autonomy of Cuban citizens or native Americans. By allowing businesses to establish certain guidelines for their workers, the Court offered a truncated form of Greek autonomy.

The Court only recently supplanted the Greek sense of autonomy with the contemporary legal sense that protects individuals from state interference. In *H.L. v. Matheson*, the Court's minority disputed the constitutionality of a statute that required a physician to notify the parents of minors seeking abortions.³⁶ The dissent claimed that the majority was upholding "family autonomy" over the minor's right to an abortion.³⁷ The "family" autonomy recognized by the Court in *Matheson* was in fact "parental" autonomy—or authority—because the autonomy of children was capitulated to parents. Unlike the cases asserting the autonomy of businesses against the government, *Matheson* involved a conflict between the autonomy of individuals, namely the autonomy of parents to regulate their children's autonomy.

The Court's early recognition of an autonomy right for foreign nations and native Americans reflects the classical Greek notion of the term. Even the Court's extension of this term to businesses is analogous to the ancient Greek use insofar as the Court recognized the freedom of social entities to establish their own internal guidelines. *Matheson*, however, presaged the conflicts of autonomy that the Court would adjudicate by substituting the fourth sense of autonomy, namely the grounding of an individual legal right, for the Greek understanding.

In the last two decades, the Supreme Court has invoked autonomy to ascribe rights to individuals who want to engage in a particular practice, rather than to political and social entities that seek to govern themselves. Of critical importance is the Court's meaning when it recognizes an individual's autonomy right. Contemporary legal scholars generally employ autonomy in a manner identical to the classical notion of liberty. Whereas John Stuart Mill stated that the principle of liberty "requires liberty of tastes and pursuits; of framing the plan of our life to

35. See *United States v. Reading Co.*, 253 U.S. 26 (1920).

36. 450 U.S. 398 (1981) (Marshall, J., dissenting).

37. See *id.* at 447-54.

suit our own character,"³⁸ the eminent liberal scholar, Joseph Raz, claimed that personal autonomy is "essentially about the freedom of persons to choose their own lives,"³⁹ and Ronald Dworkin claimed that individuals' right to autonomy is "a right to make important decisions defining their own lives for themselves."⁴⁰ In legal scholarship, both liberty and autonomy concern the freedom of an individual to make choices that define his or her own life.⁴¹

The Supreme Court emulates contemporary legal scholarship by employing autonomy synonymously with liberty: both restrain the government from interfering with an individual's personal and self-defining decisions. Regarding liberty, the Court found in *Planned Parenthood v. Casey* that self-definition is "at the heart of liberty,"⁴² and held that the Constitution guarantees that there is a "realm of personal liberty which the government may not enter."⁴³ Like liberty, autonomy also insulates an individual's important choices from state strictures. In *Casey*, the Court ruled that "[d]ecisional autonomy must limit the State's power to inject into a woman's most personal deliberations its own views of what is best,"⁴⁴ while in *Webster v. Reproductive Health Services*, the Court held that a woman's decision to carry a fetus to term must

38. JOHN STUART MILL, *On Liberty*, reprinted in UTILITARIANISM, LIBERTY, REPRESENTATIVE GOVERNMENT 81 (H.B. Acton ed., 1972).

39. RAZ, *supra* note 16, at 370 n.2.

40. RONALD DWORKIN, LIFE'S DOMINION 222 (1993).

41. See CHARLES FRIED, RIGHT AND WRONG (1978), quoted in Brief for Ronald Dworkin et al. as Amici Curiae in Support of Respondents at 5-6 n.3, *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997) (Nos. 95-1858, 96-110) ("What a person is, what he wants, the determination of his life plan, of his concept of the good, are the most intimate expressions of self-determination, and by asserting a person's responsibility for the results of this self-determination, we give substance to the concept of liberty.").

42. See *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) ("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.").

43. *Id.* at 847. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Id.* The Court has also stated that included within this realm of Fourteenth Amendment liberty is the "right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 851 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

44. *Id.* at 852 ("The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society."). See *id.* at 916 (Stevens, J., concurring in part and dissenting in part).

fall within the limited sphere of individual autonomy that lies beyond the will or the power of any transient majority.⁴⁵

Thus, the Court has recognized a right to autonomy for a century and a half but has recently altered its use of the term. Whereas the Court previously employed autonomy in the ancient Greek sense to confer the right of self-governance to political and social entities, it presently uses the term synonymously with the classical notion of liberty to uphold an individual's right to self-definition. It was against this concept of autonomy that the Court adjudicated the autonomy-based claim to assisted suicide in *Glucksberg*.

II. *GLUCKSBERG* AND AUTONOMY

The Court's opinions in *Glucksberg* mark a critical shift in the jurisprudence of autonomy, which had previously grounded rights' claims to intimate and personal acts. Part II analyzes the implications of the Court's rejection of an autonomy-based right to assisted suicide. Part II.A. examines the role played by autonomy in *Glucksberg* and the cases leading up to it; Part II.B. recounts Ronald Dworkin's critique of a general right to liberty, which threatens the indistinguishable right to autonomy; and, Part II.C. reveals that the ethical presuppositions of autonomy-based rights' claims imperil these personal rights.

A. *The Role of Autonomy in Assisted-Suicide Jurisprudence*

The right to autonomy was dispositive in the lower court decisions preceding *Glucksberg*. Both the district court⁴⁶ and an *en banc* panel of the Ninth Circuit⁴⁷ grounded the right to assisted suicide primarily on the right to autonomy formulated in *Casey*.⁴⁸ Both courts reasoned that a right to assisted suicide must be recognized if the right to autonomy protects personal and self-defining choices. However, the original three-judge panel of the

45. 492 U.S. 490 (1989).

46. *Compassion in Dying v. Washington*, 850 F. Supp. 1454 (W.D. Wash. 1994).

47. *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) (*en banc*).

48. *See Casey*, 505 U.S. at 851 ("These matters [marriage, procreation, and family relationships], 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.").

Ninth Circuit rejected the assisted suicide claim by limiting the scope of the right of autonomy to acts of abortion.⁴⁹ Thus, the issue facing the Supreme Court in *Glucksberg* was whether the right to autonomy articulated in *Casey* extended to acts of assisted suicide or was confined to abortion.

Although the Court unanimously rejected the right to assisted suicide in *Glucksberg*, the Justices' responses to the argument for autonomy diverged. Justice Kennedy joined three of the Justices hostile to the right of autonomy in *Casey* and repudiated the autonomy-based claim to assisted suicide, asserting that, although many due process rights "sound in personal autonomy," the Constitution does not legitimize all intimate and self-defining acts.⁵⁰ For these Justices, an act's autonomous character is insufficient to endow it with constitutional status; rather, additional factors, such as the nation's history and legal traditions, must distinguish those autonomous acts that merit the protection of the Due Process Clause. By limiting the scope of important autonomous choices protected by the Fourteenth Amendment, these Justices rejected a general right to autonomy that legitimizes an act solely because of its self-defining or intimate character.

The other Justices, four of whom had supported *Casey's* right to autonomy,⁵¹ not only disavowed a right to assisted suicide in *Glucksberg*, but also unwittingly undermined a right to autonomy. Fearing that a right to autonomy might foster such practices as involuntary euthanasia,⁵² they rejected this rights' claim to assisted suicide even though "Avoiding intolerable pain and the indignity of living one's final days incapacitated and in agony is certainly '[a]t the heart of [the] liberty . . . to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.'"⁵³ But if the particular claim rejected by

49. See *Compassion in Dying v. Washington*, 49 F.3d 586, 590 (9th Cir. 1995) ("The language taken from *Casey*, on which the district court pitched its principal argument, should not be removed from the context in which it was uttered.").

50. See *Washington v. Glucksberg*, 117 S. Ct. 2258, 2271 (1997) ("That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected, and *Casey* did not suggest otherwise.") (citation omitted).

51. See *Casey*, 505 U.S. at 851 (Justices O'Connor, Kennedy, Stevens, and Souter supported the right to autonomy in *Casey*).

52. See *Glucksberg*, 117 S. Ct. at 2274.

53. *Glucksberg*, 117 S. Ct. at 2307 (O'Connor, J., concurring).

the Court is as momentous as any decision that an individual could ever make, then even these Justices acknowledge that the self-defining character of certain choices is insufficient to endow them with due process protection.

Thus, even the Justices who were amenable to the right to autonomy in *Casey* abandoned this right in *Glucksberg* by denying constitutional protection to an act integral to self-definition. Left unclarified by the Court in *Glucksberg* is precisely what criterion distinguishes important autonomous choices that are constitutionally privileged, such as the right to abortion, from those that are not.

B. Dworkin's Critique of a General Right to Liberty

After the Supreme Court decision in *Casey*, some scholars supportive of the right to abortion criticized the Court for supplanting *Roe v. Wade*'s privacy-based justification with one founded on a vague and potentially unlimited right to autonomy.⁵⁴ Obviously, the right to autonomy must be circumscribed, otherwise any act would be constitutionally justified. However, the Court did not specify the parameters of this nebulous right in *Casey*. Moreover, the Court buttressed the criticisms of *Casey*'s right to autonomy when it rejected this right in *Glucksberg* without relevantly distinguishing between the autonomous acts of abortion and of assisted suicide. These criticisms of autonomy are amplified by Ronald Dworkin's critique of a general right to liberty, which reveals the formidable difficulties of limiting such a general right.

Dworkin criticizes the general right to liberty by exposing its undefined parameters.⁵⁵ In attempting to demarcate the domain of the general right to liberty, he asserts that this right cannot protect certain acts merely because they are good or desired; otherwise, the individual would retain a constitutional right to ice cream or any other chosen value.⁵⁶ However, if the general right to liberty protects only fundamental or basic liberties, then proponents must explain what makes one liberty more fundamen-

54. See Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 754 (1989) ("Where is our self-definition *not* at stake? Virtually every action a person takes could arguably be said to be an element of his self-definition.").

55. See RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 268-72 (1977).

56. See *id.* at 268.

tal than another. If fundamentality is determined by the amount of liberty thwarted by state proscriptions, then liberty is transformed into a quantity,⁵⁷ and the unenviable task of quantifying liberty arises.⁵⁸

However, if the character of the liberty accounts for its fundamental status, then violations of that liberty are judged not by their impact on liberty but on the value or interest that the liberty serves.⁵⁹ Hence, the importance of obtaining an abortion vis-à-vis ice cream, and not the violation of liberty *per se*, would account for the fundamental character of the liberty to obtain an abortion. But this would establish only a particular—rather than general—right to liberty: citizens would retain a right to liberty only in regard to important values.

All of Dworkin's criticisms can be leveled *mutatis mutandis* against the right to autonomy, which is not unexpected given the indistinguishability of autonomy and liberty in contemporary constitutional discourse noted in Part I.⁶⁰ If a general right to autonomy existed, then an individual would retain a constitutional right to any trivial desire; but restricting it to basic or fundamental acts would either require a calculus of autonomy or attach the value of autonomy to the interest that it instrumentally serves, rather than to autonomy itself.⁶¹

The latter alternative is more feasible but is ultimately self-contradictory. The right to autonomy putatively insures self-definition and freedom regarding the most important decisions that an individual makes. But if the judiciary is permitted to restrict this right only to the values that it esteems, then it subverts the individual's freedom to define his life through his chosen values, and thus undermines his right to autonomy.

Even if the judiciary were granted the authority to advocate an axiology, then a right to autonomy would exist only in regard to those values favored by the judiciary. But the judiciary would

57. See R.M. HARE, *MORAL THINKING* ch. 7 (1981), for perhaps the most rigorous, but ultimately unsuccessful, attempt to quantify liberty, which in Hare's theory is equivalent to preferences. See also PETER SINGER, *PRACTICAL ETHICS* 21-26 (1993), for a less thorough discussion.

58. See DWORKIN, *supra* note 55, at 270.

59. See *id.* at 271.

60. See *supra* Part I.B.

61. See FRITHJOF BERGMANN, *ON BEING FREE* (1977), for a rigorous explanation of the instrumental value of freedom. William Galston offers a more concise and equally cogent argument in *JUSTICE AND THE HUMAN GOOD*, *supra* note 25, at 97-99.

need to justify its criteria for differentiating autonomous decisions protected by the Due Process Clause, such as the value of obtaining an abortion vis-à-vis ice cream.⁶² Therefore, jurists would have to justify the right to autonomy by appealing to the value autonomy instrumentally serves⁶³ rather than to autonomy *per se*.⁶⁴ The instrumental character of autonomy and the conundrum it entails will be examined further in Part II.C.

C. *The Ethical Basis of the Harm Principle*

The pivotal—and most controversial—issue in due process adjudication concerns the criteria that delineate the parameters of the constitutional guarantee of liberty. In *Glucksberg*, the Supreme Court demarcated the extent of due process liberty not by appealing to the criterion of autonomy but by weighing interests, which, as this section reveals, is a method that jeopardizes contemporary constitutional jurisprudence by promulgating an ethical theory.

The Supreme Court could have recognized a right to assisted suicide in *Glucksberg* because it is an important and self-defining act, which the right to autonomy protects. Rather than employ this criterion formulated in *Casey*,⁶⁵ the Court adopted the method of weighing interests; an individual's autonomy to engage in assisted suicide would trump the State of Washington's prohibition only if the interests served by the act outweighed its harms.⁶⁶ In essence, the Supreme Court superseded the right to

62. In *Casey*, the Supreme Court attempted to explain the value of abortion. See *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992) ("The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. . . . Her suffering is too intimate and personal. . . .").

63. See RAZ, *supra* note 16.

64. See MAX CHARLESWORTH, *BIOETHICS IN A LIBERAL SOCIETY* (1993) for an opposing view.

65. See *Casey*, 505 U.S. at 851 ("These matters [marriage, procreation, and family relationships], 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.")

66. See *Washington v. Glucksberg*, 117 S. Ct. 2258, 2290 (1997) (Souter, J., concurring) ("In my judgment, the importance of the individual interest here [to a physician's assistance], as within that class of 'certain interests' demanding careful scrutiny of the State's contrary claim, cannot be gainsaid.") (citation omitted); see also *id.* at 2303 (O'Connor, J., concurring) ("[E]ven assuming that we would recognize such an interest [the individual's interest in terminating pain], I agree that the State's interests in protecting those who are not truly competent or facing imminent

autonomy with a variation of the harm principle, which prohibits a majority (or equivalently, the state) from infringing an individual's liberty unless his or her act harms another.⁶⁷ A paradigm of this principle is Justice Holmes's rejection of the liberty to mischievously scream "Fire!" in a crowded movie theater because of the potentially deleterious consequences.⁶⁸

Although the harm principle is an essential aspect of constitutional adjudication, its formal character mitigates its jurisprudential utility. As formally articulated by Mill, the harm principle neither justifies nor precludes any particular act; it merely asserts that the state can proscribe an act if it is harmful. The crucial question is what entails harm. Mill does not offer any method for determining what constitutes harmful behavior; instead, he proscribes conduct that threatens interests "which either by express legal provision or by tacit understanding, ought to be considered as rights."⁶⁹ But the legal provision is precisely what is being disputed.

By definition, to cause harm is wrong, but what constitutes harm, or correlatively, which acts should be legally proscribed, will be governed by one's view of the good.⁷⁰ If individuals assess a certain act as valuable, they judge its proscription as harmful, and therefore, unjust; conversely if they perceive the act as pernicious, then they consider its proscription just. For example, some citizens assert that hate-speech codes are harmful to the good of free speech, and therefore, must be banned as unjust;⁷¹ others, however, claim that these codes foster the goods of civility or self-awareness, and therefore are just and should be instituted.⁷²

death, or those whose decisions to hasten death would not truly be voluntary, are sufficiently weighty to justify a prohibition against physician-assisted suicide.").

67. See MILL, *On Liberty*, *supra* note 38, at 78 (arguing that the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others). Nearly every liberal scholar recurs to the harm principle. See, e.g., JOEL FEINBERG, HARMLESS WRONGDOING 10-14 (1988); H.L.A. HART, LAW, LIBERTY, AND MORALITY 4-5 (1963); RAZ, *supra* note 16, at 412-20.

68. See *Schenck v. United States*, 249 U.S. 47, 52 (1919).

69. MILL, *On Liberty*, *supra* note 38, at 143.

70. See RAZ, *supra* note 16, at 414 ("Since 'causing harm' entails by its very meaning that the action is *prima facie* wrong, it is a normative concept acquiring its specific meaning from the moral theory within which it is embedded. Without such a connection to a moral theory the harm principle is a formal principle lacking specific concrete content and leading to no policy conclusions.").

71. See Fallon, *supra* note 1, at 895.

72. See C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 59 (1989);

Similarly, supporters of pornography uphold the good of free speech or self-determined sexual practices, and thus oppose legal restrictions,⁷³ while opponents attempt to ban pornography because it purportedly harms the social and psychological well-being of women.⁷⁴ To be sure, individuals can disapprove of certain acts but refuse to proscribe them, but even the refusal is usually grounded on a view of the good, such as the socially deleterious effects of free speech abridgement.

These contemporary rights' conflicts originate not as much in disparate constitutional principles as in the diverse views of the good implicitly endorsed by individuals applying the harm principle. This inextricable link between the harm principle and moral theory is problematic for contemporary jurists, who adjudicate legal conflicts in a diverse social and moral climate. They judge a law or an act as harmful if it injures certain interests, but what constitutes injury depends on the theory of good extolled.

Jurists unwittingly obscure the ethical basis of rights' disputes by employing the term "interests"⁷⁵ instead of "goods," because the former term retains an aura of neutrality absent in the latter. Thus, jurists do not usually assert that they are choosing between alternative—and perhaps respectively compelling—goods, but that they are weighing the "interests" of the citizen and the state. However, an act or law is in an individual's or polity's interest only if it is good in a teleologic⁷⁶ or voluntarist⁷⁷

Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 279-85 (1991).

73. See NADINE STROSSEN, *DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS* (1995).

74. See CATHARINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987) (claiming that pornography causes attitudes and behaviors of violence and discrimination that define the treatment and status of half of the population); see also ROSEMARIE TONG, *WOMEN, SEX, AND THE LAW* 6-32 (1984).

75. See *Washington v. Glucksberg*, 117 S. Ct. 2258, 2283 (1997) (Souter, J., concurring) (claiming that recognizing unenumerated rights requires a "court to assess the relative 'weights' or dignities of the contending interests").

76. See Aristotle, *Nicomachean Ethics*, in *THE BASIC WORKS OF ARISTOTLE* 1175B (Richard McKeon trans., 1941) ("Now since activities differ in respect of goodness and badness, and some are worthy to be chosen, others to be avoided . . .").

77. See THOMAS HOBBS, *LEVIATHAN* 120 (C. B. Macpherson ed., 1968) ("But whatsoever is the object of any mans Appetite or Desire; that is it, which he for his part calleth Good . . . For these words of Good, Evill, and Contemptible, are ever used with relation to the person that useth them: There being nothing simply and absolutely so.").

sense.⁷⁸ Hence jurists sometimes use “interests” in a teleologic sense, for example, by claiming that the interests of the state or the individual require compulsory education of minors,⁷⁹ and at other times in a voluntarist sense, for example, by banning compulsory recitation of the pledge of allegiance because it is not in the students’ interests if they do not desire to participate.⁸⁰ Therefore, when jurists establish the limits of individual autonomy, usually by prioritizing competing interests, they necessarily implicate a theory of the good.⁸¹

This point is illustrated in *Glucksberg*, in which the Supreme Court weighed the putative harms and “interests” associated with assisted suicide only by promulgating an axiology. Justice Stevens claimed that the value of one’s life to others is too substantial to allow one complete autonomy.⁸² In his view, therefore, the social value of human life trumps the value that an individual retains in terminating a pained existence at his or her discretion. Other Justices found the harm of involuntary suicide sufficiently grave to outweigh the harm endured by the terminally ill.⁸³ Thus, the Court adjudicated this rights’ claim by prioritizing the conflicting values or goods at stake, rather than by putatively balancing the interests of the individual and the state.

78. The teleologic sense, which includes the Aristotelian, Kantian, utilitarian, and nearly all “objective” moral theories, and the voluntarist sense exhaust the genus of the good in moral and legal respects. Indeed, an individual would speak irrationally in asserting a legal claim to an act that he did not desire and that did not contribute to his well-being.

79. See *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972) (allowing the Amish to overcome compelling interest of the state in education).

80. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

81. This is true even for the most conservative members of the Court who seek to avoid imposing a view of the good. Justices Rehnquist, Scalia, and Thomas claimed that they did not have to weigh the interests of the State of Washington because they are “unquestionably important and legitimate.” *Washington v. Glucksberg*, 117 S. Ct. 2258, 2275 (1997). However, when they claimed that they found the state’s interests “important,” they were acknowledging their value. The judgment that an interest is “important” or not, for example, obtaining an abortion versus eating ice cream, depends on a view of the good. That the interest is “legitimate” begs the question.

82. See *id.* at 2305 (Stevens, J., concurring) (“The value to others of a person’s life is far too precious to allow the individual to claim a constitutional entitlement to complete autonomy in making a decision to end that life.”).

83. See *id.* at 2290 (Souter, J., concurring) (“In my judgment, the importance of the individual interest here [to physician’s assistance], as within that class of certain interests’ demanding careful scrutiny of the State’s contrary claim cannot be gainsaid.”) (citation omitted).

This subordination of autonomy to moral theory undermines several influential strains of contemporary legal theory. The Court claims that it is neutral toward competing views of the good,⁸⁴ and certain legal scholars, namely "political liberals," require state neutrality;⁸⁵ otherwise the state would violate the equal respect⁸⁶ or other important obligations owed to each citizen. However, since the interests cited in *Glucksberg* necessarily reflect a view of the good, the Court's decision violates the "political liberals" requirement of state neutrality. This would be true irrespective of which party's interests the Court upheld in *Glucksberg* because both Washington State's and the plaintiffs' notions of liberty and harm are implicitly tethered to views of the good. Political liberals have not fully appreciated that even John Stuart Mill, who authored the modern notion of liberty, subordinated liberty to utilitarian moral theory.⁸⁷

Another strain of contemporary liberalism, "comprehensive liberalism," acknowledges that the state ultimately imposes moral theory and supports state action that promotes individual autonomy.⁸⁸ But even if comprehensive liberals could justify the judiciary's promotion of a liberal ideal, rather than that of communitarianism or another theory endorsed by the majority, they must promulgate an axiology on another level. As noted

84. See *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992) ("Our obligation is to define the liberty of all, not to mandate our own moral code."). For other jurists, see *People v. Kevorkian*, 527 N.W.2d 714, 752 (Mich. 1994), "Defining liberty, therefore, cannot involve a morality play by any group or by a general disapproval by the majority of this Court."

85. See RONALD DWORKIN, *A MATTER OF PRINCIPLE* 191 (1985) (asserting "equality supposes that political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life. . . . [T]he government does not treat them [citizens] as equals if it prefers one conception to another . . ."). See generally BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

86. See DWORKIN, *supra* note 85; CHARLES LARMORE, *PATTERNS OF MORAL COMPLEXITY* 67 (1987) ("A commitment to treating others with equal respect forms the ultimate reason why in the face of disagreement we should keep the conversation going, and to do that, of course, we must retreat to neutral ground."); RAWLS, *supra* note 85.

87. See MILL, *On Liberty*, *supra* note 38, at 79 ("I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being. Those interests, I contend, authorise the subjection of individual spontaneity to external control, only in respect to those actions of each, which concern the interests of other people.").

88. See RAZ, *supra* note 16; Stephen Gardbaum, *Liberalism, Autonomy and Moral Conflict*, 48 *STAN. L. REV.* 385, 404-17 (1996); Stephen A. Gardbaum, *Why the Liberal State Can Promote Moral Ideals After All*, 104 *HARV. L. REV.* 1350 (1991).

above, the central issue of due process adjudication is the criterion that differentiates those autonomous acts meriting constitutional protection. Therefore, even after choosing to promote autonomy, jurists, legislators, or citizens must prioritize particular autonomous acts. In *Glucksberg*, an individual's negative autonomy to avoid involuntary euthanasia and maintain the value of human life was accorded axiological priority over the positive autonomy to terminate a painful existence.⁸⁹ Thus, comprehensive liberals must not only defend government advocacy of a general theory of the good premised on individual autonomy, but they must also justify the judiciary's hierarchy of specific values, such as in *Glucksberg*, the preeminence of the value of human life over an individual's desire to terminate a pain-filled existence.

Because the harm principle is essential to any theory of autonomy or liberty, jurists who weigh the harms and benefits of any specific law ultimately advocate a theory of the good. In morally heterogeneous contemporary America, the absence of a monolithic moral theory engenders controversy on myriad social issues and accounts for the discrepant judicial opinions regarding the act of assisted suicide.⁹⁰ The ethical basis of autonomy threatens the exercise of judicial review, a problem that is illustrated in *Glucksberg* but that extends to other aspects of due process adjudication, as will be discussed in Part III.

III. STATES' RIGHTS AND JUDICIAL REVIEW

The preceding analysis of the general right to autonomy can be extended to other aspects of due process adjudication. Whether or not jurists classify a particular act as a fundamental liberty or a mere liberty-interest, they ultimately weigh the value of the autonomy to engage in that particular behavior against the

89. See *Washington v. Glucksberg*, 117 S. Ct. 2258, 2283 (1997) (Souter, J., concurring) ("This approach calls for a court to assess the relative 'weights' or dignities of the contending interests . . .").

90. Note that in four different decisions, jurists who were determining the limits of liberty could not agree on what the right to liberty or autonomy meant. The differences emanate from the conflicting views of the good retained. See *Glucksberg*, 117 S. Ct. 2258; *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) (en banc); *Compassion in Dying v. Washington*, 49 F.3d 586 (9th Cir. 1995); *Compassion in Dying v. Washington*, 850 F. Supp. 1454 (W.D. Wash. 1994).

"interests" of the state.⁹¹ However, they can determine if a state's interest is in fact "legitimate" only by considering the extent of the harm that the interest might entail in a particular instance.⁹² If the critique in the preceding section and the claims of comprehensive liberals are correct, namely that the state inevitably endorses a view of the good, then the judiciary must defend undermining the will of the people by substituting its axiology for that of the legislature's or the citizenry's. This Part probes the challenge that *Glucksberg* poses to the justification of judicial review.

A. States' Rights

This section examines the judiciary's responses to Washington State's and Oregon's contrasting statutes regarding assisted suicide. It reveals that the concept of autonomy employed by the Ninth Circuit in supplanting the Washington statute⁹³ actually supports a legislature's claim to enact just such controversial statutes that either criminalize or legalize assisted suicide.

Washington legislators banned assisted suicide after carefully weighing, according to their axiology, the harms and benefits of the act.⁹⁴ Because the Constitution's language and history offer no explicit guidance regarding assisted suicide, the Supreme Court adjudicated this rights' claim by balancing the harms and benefits of the act according to its distinctive axiology.⁹⁵ The difference between the respective judgments is only nominal, in that the outcome of the Court's weighing is termed a right,⁹⁶ the legislature's, a statute.

91. This contradicts the opinion of Justices Rehnquist, Scalia, and Thomas, who claim that a threshold requirement avoids the need for balancing competing interests. See *Glucksberg*, 117 S. Ct. at 2268 ("[B]y establishing a threshold requirement—that a challenged state action implicate a fundamental right—before requiring more than a reasonable relation to a legitimate state interest to justify the action, it avoids the need for complex balancing of competing interests in every case."). See *supra* note 81 for the deficiency of this view.

92. See *Glucksberg*, 117 S. Ct. at 2275.

93. See *Compassion in Dying*, 79 F.3d at 790.

94. See *id.* at 817. The state allowed refusal of treatment thereby showing how it weighed interests differently in different circumstances. *Id.*

95. See *Glucksberg*, 117 S. Ct. at 2305 (Stevens, J., concurring) ("The value to others of a person's life is far too precious to allow the individual to claim a constitutional entitlement. . .").

96. The judiciary ultimately recognizes either the right of the individual or the state.

This approach is problematic because if the judiciary merely substitutes its axiology for the legislature's in a representative democracy, then judicial review subverts democratic rule. The Ninth Circuit defended its exercise of judicial review of the Washington statute by claiming that balancing interests "entails the exercise of judicial judgment rather than the application of scientific or mathematical formulae. No legislative body can perform the task for us."⁹⁷ Obviously, neither scientific nor mathematical formulae can weigh the respective "interests," but the question that the jurists beg is why legislators, who are both individual citizens and representatives of the state, are incapable of weighing the respective interests (or values) of the individual and the state.

Glucksberg illustrates the dilemma inherent in judicial review of autonomy-based personal rights. Jurists carve out a niche for judicial review by claiming to balance the individual's autonomy or liberty against the state's interests.⁹⁸ However, the "state's interests" in American democracy are the interests of the majority of individuals or their elected representatives. The majority seeks the autonomy or liberty to attain a particular view of the good through legislation, such as the prevention of involuntary euthanasia, which conflicts with a minority of individuals' autonomous choice to fulfill a discrepant view of the good, such as the termination of a meaningless or pain-filled existence. Since the parties to any rights' dispute seek the freedom to attain their respective views of the good, individuals comprising either party can articulate an autonomy claim.

If the state, that is the majority of individuals who support particular legislation, seek the autonomy to enact a particular view of the good, then jurists who uphold the autonomy of "the individual" to attain his or her view of the good undermine the autonomy of a greater number of other individuals to achieve theirs. As noted above, jurists must resolve the conflicting autonomy claims by either quantifying autonomy or appealing to the

97. *Compassion in Dying*, 79 F.3d at 836.

98. See *Glucksberg*, 117 S. Ct. at 2306 (Stevens, J., concurring) ("In most cases, the individual's constitutionally protected interest in his or her own physical autonomy, including the right to refuse unwanted medical treatment, will give way to the State's interests in preserving human life.").

values that underlie the claims.⁹⁹ Since the former alternative is untenable, the judiciary opts for the latter.

However, if the judiciary merely weighs the interests in conflict, then its judgment is indistinguishable from the legislature's when the Constitution is silent on a particular issue: both legislators and jurists prioritize conflicting values to determine whether a specific liberty should be permitted. Therefore, the judiciary's putative balancing of the individual's and state's interests is both specious, because the state is composed of individuals, and irrelevant, since the judiciary ultimately upholds the claim that accords with its own axiology, whether the claim is asserted by the state or individual.

This axiology that the Court employed in *Glucksberg* to uphold Washington's proscription of assisted suicide will impede the Court's future attempts to recognize an autonomy-based claim to assisted suicide. The Court's recent denial of *certiorari* in *Lee v. Oregon*,¹⁰⁰ in which some citizens challenged Oregon's legalization of assisted suicide, magnifies the grave implications of *Glucksberg*. The Court would face an obstacle in upholding *Lee* (and other assisted-suicide claims) because if the state's interests in human life trumped the competing autonomy interests in *Glucksberg*, then the relative weights of these interests could not be transposed merely because a majority of Oregonians voted otherwise.

If faced with adjudicating the issue, the Court could allow Oregon to enact its law if the Justices employ a standard of rational review when the state regulates an autonomous act. This standard, which essentially defers to legislative choice in all but those cases where the means chosen by the state do not serve the end, was utilized by Justices Kennedy, Rehnquist, Scalia, and Thomas in *Glucksberg*. But this approach to autonomy in the context of assisted suicide would allow the majority in each state to proscribe not only assisted suicide but also other acts crucial to autonomy.

The Court's options in *Lee* reveal the dilemma that the Court created for itself by rejecting the right to autonomy in *Glucksberg*. Affirming Oregon's law would undercut the state's interest in protecting human life relied upon by the Court in *Glucksberg* to

99. See *supra* Part II.B.

100. 891 F. Supp. 1429 (D. Or. 1995), *vacated for lack of jurisdiction*, 107 F.3d 1382 (9th Cir. 1997), *cert. denied*, *Lee v. Harclerod*, 118 S. Ct. 328 (1997).

trump the important autonomy claim in favor of assisted suicide. Overturning Oregon's law would affirm the state's interest accepted in *Glucksberg* but would deny autonomy—not only an individual's but that of a majority.

Thus, whether an interest is retained by an individual or the state is irrelevant to the disposition of a rights' claim; rather, a jurist's estimation of the underlying values governs the resolution of the claim. The need for a justification of judicial review, which in certain cases reduces to promulgation of an ethical theory, is apparent.

B. *The Majoritarian Challenge to Judicial Review*

In *Glucksberg*, the Supreme Court deferred to the democratic process by allowing the voters and their representatives to strike what the Court thought was the proper balance between the interests of the suffering and those who fear the consequences of assisted suicide.¹⁰¹ But by allowing this intimate and momentous choice to be determined by the preferences of the majority, the Court attenuated the argument for judicial review in regard to other intimate and self-defining decisions.¹⁰² As this section reveals, a more cogent defense of judicial review is needed.

The crux of the argument for judicial review, which usually assumes one of three forms, is that the majority would otherwise unjustly dominate the minority. One version of this argument is that the majority might dictate a view of the good for minorities,¹⁰³ but the discussion in Part II exposed the deficiency of this claim: nearly all rights' claims emanate from such views.¹⁰⁴

101. *Glucksberg*, 117 S. Ct. at 2303 (O'Connor, J., concurring) ("There is no reason to think the democratic process will not strike the proper balance between the interests of terminally ill, mentally competent individuals who would seek to end their suffering and the State's interests in protecting those who might seek to end life mistakenly or under pressure.").

102. See Brief for Ronald Dworkin et al. as Amici Curiae in Support of Respondents at 6 n.3, *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997) (Nos. 95-1858, 96-110) (arguing that the Court would undermine a right to autonomy in regard to other self-defining choices).

103. *Glucksberg*, 117 S. Ct. at 2290 (Souter, J., concurring) ("In my judgment, the importance of the individual interest here [to physician's assistance], as within that class of 'certain interests' demanding careful scrutiny of the State's contrary claim cannot be gainsaid.") (citations omitted); see *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) (en banc).

104. See *supra* Part II.C.

A second, and more potent, form of this argument is historical: when unchecked, majoritarian democracies have perpetrated grave injustices, and therefore judicial review safeguards basic civil rights by legally proscribing prejudices and other perfidious intentions.¹⁰⁵ The Supreme Court's rectification of unjust majoritarian laws in cases such as *Brown v. Board of Education*¹⁰⁶ and *Loving v. Virginia*¹⁰⁷ buttresses this argument.¹⁰⁸ Hence judicial review putatively tempers the excesses of unprincipled majorities.

Although majoritarian democracies have undoubtedly enacted unjust laws, history hardly vindicates the judgment of the judiciary as a safeguard for the minority. *Dred Scott*,¹⁰⁹ *Buck v. Bell*,¹¹⁰ and *Plessy v. Ferguson*¹¹¹ vitiate any belief in the superiority of the judiciary's judgment, even in regard to the most elementary questions of justice. Furthermore, it was the majority—by passing the Fourteenth Amendment—that rectified judicial injustices and provided the foundation of American civil rights. Neither the judiciary nor the majority exercises infallible judgment; therefore, this historical criticism of majoritarianism undermines the practice of judicial review also.

A third form of the argument for judicial review is that the majority, sometimes encouraged by manipulative influences,¹¹²

105. See DWORKIN, *supra* note 85, at 360-65. Dworkin argues that neutral utilitarianism, in which each person is allowed a vote to express his preference, would permit Nazism. See Rubinfeld, *supra* note 54, at 807 ("Now the scope of federal legislative power has become clear; now the Constitution has come to be the protector of fundamental liberties against state governments as well; and now governmental power has so expanded that it affirmatively shapes our lives with the potential for total control."); Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 82 (1985) (arguing that one of the problems with "pluralism," or majoritarianism, is that some preferences are objectionable).

106. 347 U.S. 483 (1954).

107. 388 U.S. 1 (1967).

108. See RONALD DWORKIN, *FREEDOM'S LAW: A MORAL READING OF THE CONSTITUTION* 12 (1996) ("[P]ractice has now settled that courts do have a responsibility to declare and act on their best understanding of what the Constitution forbids. If [Justice Learned] Hand's view had been accepted, the Supreme Court could not have decided, as it did in its famous *Brown* decision in 1954, that the equal protection clause outlaws racial segregation in public schools.").

109. *Scott v. Sanford*, 60 U.S. 393 (1856).

110. 274 U.S. 200 (1927).

111. 163 U.S. 537 (1896).

112. See Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1545 (1988). Public choice theory has shown that manipulative behavior can prevent majoritarianism from providing an accurate aggregation of preferences. See *id.*

exhibits intemperate or imprudent judgment. However, the majority is subject to the same imprudence when electing congressional representatives and presidents; therefore, the judgment of a judiciary that is selected by the (perhaps) imprudently-chosen President and Senate is similarly impugned. Indeed, criticisms of the majority's capacity to choose justly or wisely—whether or not they are subject to manipulative forces—denigrates both democracy in general and the judiciary specifically. This cursory critique of various justifications of judicial review does not preclude a cogent defense of this practice. However, the Court complicated the defense by permitting the majority to limit an act central to an individual's autonomy in *Glucksberg*.

Underlying this conflict between majoritarianism and the exercise of judicial review is the tension between the ancient Greek sense of autonomy as political self-government, and the contemporary legal sense of autonomy as individual self-definition. In a democracy, the majority of individuals define themselves by legislating a view of the good, hence the minority of individuals will have to surrender the freedom of self-definition. The alternatives are either judicial imposition of ethical theory, or, as Robert Paul Wolff noted, anarchy.¹¹³ The fundamental political question facing contemporary America is whether democracy should be sacrificed to preclude democratic tyranny.¹¹⁴

CONCLUSION

The right to autonomy originally protected social and political bodies in constitutional law, but in the past few decades it has been invoked to protect the rights of the individual against the

113. See ROBERT P. WOLFF, IN DEFENSE OF ANARCHISM 18-19 (1979). Wolff's thesis, which has not been given the consideration by scholars that it is due, is essentially correct: In a democracy, a minority surrenders its autonomy when it loses its vote on a particular issue because when one party is able to attain its autonomy, those with a competing view lose theirs. The same relationship applies to the Court's recognition of one group's autonomy—the competing claims to autonomy are proscribed and thus these citizens surrender their autonomy. Any organized society will entail this outcome; the only alternative is anarchy, but even in an anarchy, someone's autonomy—usually the vulnerable's—will be abrogated. See *id.*

114. See David Walzer, *Liberalism and the Art of Separation*, 12 POLITICAL THEORY 328 (1984).

state. The individual right to autonomy is not controversial when attached to a value that enjoys consensus support, such as the individual's autonomy to be free of unwanted mail¹¹⁵ or to represent himself in court.¹¹⁶ However, its dependence on a view of the good guarantees controversy when the instrumental value of autonomy protects disputed goods.

Glucksberg is a critical case in constitutional jurisprudence because it marks a significant retreat from the Court's progressive extension of the right to autonomy from political and social entities to private citizens. Furthermore, by rejecting a right to the self-defining act of assisted suicide, the Court abandoned the criterion of fundamentality articulated in *Casey*, thereby leaving other important rights grounded on autonomy bereft of rational justification. Moreover, *Glucksberg* reveals the subordination of autonomy to ethical theory, and thus the Court provoked a crisis in contemporary constitutional theory by imposing an axiology that defines the limits of personal autonomy or liberty.

The crucial question raised by the contemporary concept of autonomy is whether judicial review of controversial individual rights is a viable political practice in morally diverse, post-modern America.¹¹⁷ If hermeneutic inquiries into the constitutional limits of autonomy and liberty are actually governed by moral theory—rather than by legal principle—then the judiciary imposes a view of the good whenever it mediates important personal rights' disputes.

If, as the Court has maintained, the state cannot dictate moral theory, then the judiciary, which is an agent of the state, violates constitutional law. And if the judiciary asserts the authority to promulgate a substantive view of the good, then it must justify both its peculiar moral theory¹¹⁸ and its constitu-

115. See *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970).

116. See *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942); *Faretta v. California*, 422 U.S. 806 (1975).

117. An individual's conception of freedom will depend on his moral theory and philosophical anthropology. For a comprehensive treatment of the various conceptions of freedom, see MORTIMER J. ADLER, *THE IDEA OF FREEDOM*, vols. I & II (1961).

118. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 68-69. The Court cannot justify the truth of its view of the good by appealing to majority consensus, because then its role is redundant in a democracy. However, if the Court appeals to the consensus of a few individuals, then it must justify the truth of its axiology in the face of extensive opposition. See *id.*

tional authority to impose that view of the good,¹¹⁹ without appealing to the right of individual autonomy or liberty, which would beg the question. The threat posed by *Glucksberg* to the practice of judicial review is problematic, the need for justification, grave.

119. See *Marbury v. Madison*, 5 U.S. 137 (1803). *Marbury* begs the question of whether the Court should retain the authority of judicial review. See *id.*

