LIVE FREE OR DIE? ANALYZING THE RIGHT TO MEDICAL AID IN DYING, THROUGH A CONSTITUTIONAL/ANTITRUST LAW MATRIX

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The sunshine state is turning silver, and the rights that individuals possess over their life and bodily autonomy remain hot button issues. With the percentage of Florida's elderly population increasing, issues surrounding aging and end of life planning will continue toward the foreground of the social consciousness. This Note focuses on the right to exercise one's liberty at the end of life and to decide when and how they wish to pass on from this world. Social and legal tradition have painted a paternalistic gloss on the discussion around seeking medical aid in dying – referred to in this paper as opting out – and either ignored or declined to meaningfully examine the nuance surrounding the issue. This paper argues that Florida's prohibition of the right to opt out is both an unconstitutional violation of liberty and a contravention of anti-trust law principles. Suppressing one's right to opt out effectively suppresses the existence of a corresponding market in the economy's healthcare sector. Such action by the state is functionally anti-competitive and in restraint of trade.

Table of Contents

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I. Introduction

What is the point of life—to live as long as possible or to live well? It may be an oversimplistic dichotomy, but the question is one of particular relevance to the elder population of the United States.[1] As the country's elders reach projections of increased population share,[2] their needs will demand commensurate attention in the policy landscape. These needs vary among individuals and include greater nuance in age discrimination law that addresses the "intersectionality of age and sex,"[3] increased health equity in the Medicare program,[4] counter-financial exploitation support,[5] hospice or palliative care services near the end of life,[6] and—of critical importance to this Note—a formalized and comprehensive acknowledgment of autonomy in end-of-life planning.[7]

In a 2017 report, 71% of study participants viewed helping people die without pain, discomfort, and stress as more important than preventing death and extending life as long as possible.[8] At

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[1] David Busscher, Note, *Linking Assisted Suicide and Abortion: Life, Death, and Choice*, 23 ELDER L.J. 123, 124 (2015).

[2] *See* U.N., Dep't Econ. & Soc. Aff., Pop. Div., *World Population Prospects: The 2017 Revision, Key Findings and Advance Tables*, at 11, U.N. Doc. ESA/P/WP/248 (2017).

[3] Joanne Song McLaughlin, *Limited Legal Recourse for Older Women's Intersectional Discrimination Under the Age Discrimination in Employment Act*, 26 ELDER L.J. 287, 289–90 (2019) ("The increasing number of older women in the labor market raises the concern that older women face unique challenges in the workplace, for being both old and female, that are not adequately covered by the [Age Discrimination in Employment Act] ADEA. This unique type of discrimination, based on two protected classes (i.e., age and sex), is referred to as intersectional discrimination (also called "age-plus-sex" or "sex-plus-age" discrimination). The ADEA has never recognized this intersectionality of discrimination. In other words, older women may be *more* discriminated against for being old *and* female, but our current federal age discrimination law cannot protect older women from this intersectional discrimination. Older women's discrimination is different from age discrimination or sex discrimination individually, but their discrimination claims can be classified as only age discrimination under the ADEA.").

[4] *See* Kata Kertesz, *Expansions of Medigap Consumer Protections are Necessary to Promote Health Equity in the Medicare Program*, 13 J. AGING L. & POL'Y 39, 39 (2022).

[5] *See* Jesse R. Morton & Scott Rosenbaum, *An Analysis of Elder Financial Exploitation: Financial Institutions Shirking Their Legal Obligations to Prevent, Detect, and Report this "Hidden" Crime*, 27 ELDER L.J. 261, 263–264 (2020) ("To address and attempt to mitigate the growing issue of elder financial exploitation, the Financial Industry Regulatory Authority ("FINRA"), the Securities and Exchange Commission ("SEC"), and other agencies have recently enacted various guidance and rules specifically designed to better protect seniors and other at-risk adults, such as those who are disabled."). Yet, the authors assert that "[l]awmakers at both the state and federal levels should both enhance existing laws and enact new laws that emphasize the importance and criticality of financial institutions preventing, detecting, and reporting elder financial exploitation." *Id.* at 292.

[6] *See* Zachery Sager et al., *Making End-of-Life Care Decisions for Older Adults Subject to Guardianship*, 27 ELDER L.J. 1, 4 (2019) ("As a philosophy, hospice recognizes that dying is a normal part of life and aims to restore an individual's dignity while focusing on efforts to improve quality of life and provide comfort. As such, the goals of hospice may stand in contrast to a state's 'unqualified interest in the preservation of human life'… palliative care is intended for any individual with a serious life-limiting disease. Palliative care can be offered concurrently with life-sustaining care or may be independent. Palliative care also provides services across the continuum, including in the inpatient, outpatient, nursing facility, and home settings.").

[7] *See* Kathy L. Cerminara & Barbara A. Noah, *Removing Obstacles to a Peaceful Death*, 25 ELDER L.J. 197, 197 (2018) ("We all will die, but the American health care system often impedes a peaceful death. Instead of a quiet death at home surrounded by loved ones, many of us suffer through overutilization of sometimes-toxic therapeutic interventions long past the time when those interventions do more good than harm.").

[8] Liz Hamel et al., *Views and Experiences with End-of-Life Medical Care in the U.S.*, KAISER FAM. FOUND., Apr. 2017, at 7, https://files.kff.org/attachment/Report-Views-and-Experiences-with-End-of-Life-Medical-Care-in-the-US. The Kaiser Family Foundation, in partnership with The Economist, conducted a survey of adults in the United States, Italy, Japan, and Brazil regarding participants' views on preparing and providing care for people nearing the end of life. *Id.* at 1.

present, seven countries have laws that allow for citizens to seek medical aid in dying: Belgium, Luxembourg, Canada, New Zealand, Spain, the Netherlands, and Colombia.[9] Switzerland also provides a comparatively less-regulated environment in which death assisted by nonphysicians is permitted.[10]

The Supreme Court has affirmed the right to refuse life-saving medical care[11] as the arc along which the state's "unqualified interest in the preservation of human life" bends.[12] It has failed, however, to recognize a comprehensive right to autonomy in one's medical decision-making process, by leaving the legality of physician-assisted dying or, opting out, to the discretion of the states.[13]

This Note recognizes there are various terms used to describe one's decision to end their life.[14] Going forward, this Note uses the term "opt out" interchangeably with "physician-assisted suicide" and "seeking medical aid in dying."

The argument put forth in this Note aims to provide a backstop to the Supreme Court's (and lower courts') reliance on tradition as a justification for the suppression of one's right to opt out.[15] This note argues that this right is derived from a fair reading of the Due Process Clause of the Fourteenth Amendment and the Delegation of Powers Clause in the Tenth Amendment, which explicitly reserves the difference in the central versus state government balance of power "to the people."[16]

As to the question of whether life and death fall within the realm of trade or commerce – which antitrust law aims to protect from unfair practices – this Note argues that the former is inextricably linked with the latter[17] and, as a result, should be subject to protection by the laws that regulate the market. Laws that prohibit the very existence of what would otherwise be a micromarket regulated for fairness and competition are, in effect, anticompetitive. Free and unfettered competition in this area of the healthcare market would empower elders to exercise a comprehensive right to live and die with dignity, under a legitimate and ethical rule of law.

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[9] Albinson Linares, *These People Want to Die. Will Their Countries Allow Euthanasia?*, NBC NEWS (Oct. 21, 2021), https://www.nbcnews.com/news/latino/people-want-die-will-countries-allow-euthanasia-rcna3307.

[10] Sarah Vilpert et al., *Social, Cultural and Experiential Patterning of Attitudes and Behaviour Towards Assisted Suicide in Switzerland: Evidence from a National Population-Based Study*, 150 SWISS MED.WKLY., July 2020, at 1, https://smw.ch/index.php/smw/article/view/2816/4567.

[11] Washington v. Glucksberg, 521 U.S. 702, 723 (1997) (citing Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 279 (1990)).

[12] Busscher, *supra* note 1, at 143.

[13] *Glucksberg,* 521 U.S. at 735.

[14] *See Glossary of Terms*, DEATH WITH DIGNITY https://deathwithdignity.org/resources/assisted-dying-glossary/ (last accessed Oct. 26, 2022).

[15] *See generally Glucksberg*, 521 U.S. at 721.

[16] U.S. CONST. amend. X.

[17] *See* Mohamed Rabie, A Theory of Sustainable Sociocultural and Economic Development 67 (Palgrave Macmillan N.Y., 2016). "The existence of an economy is essential to the formation and sustenance of society. No society can survive without an economy efficient enough to meet, at the very least, the basic needs of its members. Every economy exists for the sole purpose of meeting the growing needs of people as life conditions change. Economy, therefore, is a component of society; and society is the framework within which economy functions. Because of this relationship, every society has its own economy, and every economy reflects the needs and cultural attributes of society, as well as the major traits of the civilization in which it lives."

Using Florida—the state with the highest percentage of people aged sixty-five or older[18] — and Oregon—the first state to adopt a Death with Dignity Act[19]—for reference, this Note advances the argument in favor of the right to opt out by analyzing its merits: first, through a constitutional lens and, second, in consideration of antitrust law principles. It argues that (1) taken together, the Due Process Clause and the reservation of powers "to the people" in the Fourteenth[20] and Tenth[21] Amendments create a fundamental right to opt out and (2) that state law prohibiting the decision to opt out violates antitrust law principles which promote "free and unfettered competition as the rule of trade."[22]

Summary of the Law

A. Due Process, the Right to Privacy, and the Ninth Amendment

In the seminal 1997 case *Washington v. Glucksberg*, the Supreme Court held that the state of Washington's law banning assisted suicide did not violate the Due Process Clause of the

[18] Maria Toscano & Emma Rubin, *Population over 65 by State*, CONSUMER AFFAIRS https://www.consumeraffairs.com/homeowners/elderly-population-by-state.html (last updated Feb. 6, 2024).

[19] *Oregon*, DEATH WITH DIGNITY https://deathwithdignity.org/states/oregon/ (last accessed Dec. 8, 2022); Death with Dignity, *Glossary of Terms*, DEATH WITH DIGNITY https://deathwithdignity.org/resources/assisted-dying-glossary/ (last accessed Oct. 26, 2022). Assisted Death, also known as "physician-assisted dying" or "aid in dying" is legal in all states with existing death with dignity laws. It permits mentally competent, adult patients with terminal illness to request a prescription for life-ending medications from their physician. The patient must self-administer and ingest the medication without assistance; Euthanasia, this is translated literally as "good death" and refers to the act of painlessly, but deliberately, causing the death of another who is suffering from an incurable, painful disease or condition. It is commonly thought of as lethal injection, and it is sometimes referred to as "mercy killing." All forms of euthanasia are illegal in the United States. The Glossary identifies and provides definitions for five classes of euthanasia. Suicide is generally defined as the act of taking one's own life voluntarily and intentionally. Because an adult patient with terminal illness who is deemed mentally competent chooses to hasten their death through a physician's assistance, "physician-assisted dying" is more accurate than "physician-assisted suicide." Terminal (or Palliative) Sedation, generally practiced during the final days or hours of a dying patient's life, this coma-like state is medically induced through medication when symptoms such as pain, nausea, breathlessness, or delirium cannot be controlled while the patient is conscious. Patients generally die from the sedation's secondary effects of dehydration or other intervening complications.

[20] U.S. CONST. amend. XIV, § 1. The Due Process Clause of the Constitution states, in relevant part, that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[21] U.S. CONST. amend. X.

[22] *The Antitrust Laws*, FED. TRADE COMM'N., https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Nov. 20, 2024). "Congress passed the first antitrust law, the Sherman Act, in 1890 as a 'comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade'… Courts have applied the antitrust laws to changing markets, from a time of horse and buggies to the present digital age." *See also* FLA. STAT. § 542.16 (2022). The statute provides that, "[t]he Legislature declares it to be the purpose of this act to complement the body of federal law prohibiting restraints of trade or commerce in order to foster effective competition. It is the intent of the Legislature that this act be liberally construed to accomplish its beneficial purpose."

Fourteenth Amendment,[23] nor was it unconstitutional.[24] The Court held that the "asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause."[25] The Court focused on the deeply entrenched Anglo-American "tradition" of viewing the decision to end one's life, and assistance by another to affect that outcome, as criminal and counter to state interests—even in instances where one suffers from a terminal disease.[26]

The Court asserted that a substantive due-process analysis proceeds along two axes: (1) whether the right asserted constitutes a fundamental right and liberty interest that is "deeply rooted in the [n]ation's history and tradition," and (2) whether the asserted interest has been articulated with "careful description."[27] The claimants and the Ninth Circuit on appeal used several descriptors to characterize the asserted right, including: the "right to determine the time and manner of one's death, the right to die, a liberty to choose how to die, a right to control of one's final days, the right to choose a humane, dignified death, and the liberty to shape death."[28] The Court held that these descriptors did not precisely characterize the right being argued. Rather, the Court determined that the accurate articulation was the "right to commit suicide which itself includes a right to assistance in doing so."[29]

The Court also weighed the interests being infringed upon against those of the state, to determine whether the constitutional requirement that an infringing law or action (here, a ban on physician-assisted suicide) be "rationally related to legitimate government interests," was satisfied.[30] The Court found that the state had several interests which satisfied the rational basis requirement, including "prohibiting intentional killing and preserving human life," and the protection of vulnerable populations, like the elderly, from "indifference, prejudice, and psychological and financial pressure to end their lives."[31] And thus, the Court concluded that the legal precedent did not support an acknowledgment of the right to opt out.[32]

The right to privacy has also provided little aperature through which courts are willing to perceive the implicit right to opt out. Despite the Supreme Court inferring a constitutional right to privacy from the document's explicit provisions[33] and states, like Florida, enshrining to citizens a

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[24] 521 U.S. at 719.

[25] *Id.* at 703.

[26] *Id.* at 702. The Court held that, "An examination of our Nation's history, legal traditions, and practices demonstrates that Anglo–American common law has punished or otherwise disapproved of assisting suicide for over 700 years; that rendering such assistance is still a crime in almost every State; that such prohibitions have never contained exceptions for those who were near death…"

[27] *Id.* at 703.

[28] *Id.*

[29] *Id.*

[30] *Id.* (citing Heller v. Doe, 509 U.S. 312, 319-320 (1993)).

[31] *Id.* at 703-04.

[32] *Id.* The Court held that "[t]o hold for respondents, [it] would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every [s]tate."

[33] *E.g.,* Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (holding that Connecticut's law prohibiting the use of contraceptives on the grounds that it unconstitutionally intruded upon the right to marital privacy); Eisenstadt v. Baird, 405 U.S. 438 (1972) (construing the right to privacy identified in *Griswold v. Connecticut* by holding that "[i]f the right of privacy means anything, it 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

constitutional right to privacy,[34] courts have declined to extend the right to privacy to find opting out permissible where lawmakers have not so legislated.[35]

In the late nineties, the debate around the right to die entered the foreground of the national consciousness. This was due, in large part, to the actions of Dr. Jack Kevorkian, at times referred to by the media as Dr. Death.[36] The state of Michigan brought suit against him for administering a lethal injection.[37] The subject of this lethal injection, Thomas Youk, suffered from the debilitating infirmity, amyotrophic lateral sclerosis (ALS), otherwise known as Lou Gehrig's disease.[38] Youk had reached out to Dr. Kevorkian who was then relatively well known for his work with terminal and severely ailing patients. The former racecar driver had lost the use of his legs, struggled to speak due to his diminished control over the muscles in his mouth and neck, and greatly feared choking to death.[39]

Dr. Kevorkian argued that the right to be free from "inexorable pain and suffering" – and thus, the right to euthanasia – is among the unenumerated rights reserved to the people under the Ninth Amendment.[40] The Court rejected this argument, however, on the grounds of a lack of sufficiently supportive rationale.[41] Because Michigan state laws – the state in which Dr. Kevorkian

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or beget a child."). *See generally* Cornell Law School Legal Information Institute, Privacy, https://www.law.cornell.edu/wex/privacy (last accessed Oct. 27, 2022) (explaining that the Court has since relied more on Justice Harlan's concurrence in *Griswold v. Connecticut* than the majority opinion in subsequent privacy cases, in which derived the right to privacy from the Fourteenth Amendment rather than the constitutional penumbras. Also noting that "after the ***Dobbs*** decision, the Court overturned both *Roe* and ***Casey***. Consequently, the right to abortion no longer falls under the broader right to privacy. Additionally, the *Dobbs* opinion mentioned potentially examining *Griswold* and *Eisenstadt* in the future. While it is unclear to what extent that may have on the right to privacy in the current time; it is likely that the case law around this right will continue to evolve with more recent Supreme Court decisions."

[34] FLA. CONST. art. I, § 23.

[35] People v. Kevorkian, 639 N.W.2d 291, 297 (Mich. Ct. App. 2002). Relying on *Glucksberg*, the court held, "[d]efendant, in what is now apparently something of an afterthought, asks us to conclude that euthanasia is legal and, therefore, to reverse his conviction on constitutional grounds. We refuse. Such a holding would be the first step down a very steep and very slippery slope. To paraphrase the United States Supreme Court in *Washington v. Glucksberg,* it would expand the right to privacy to include a right to commit euthanasia and thus place the issue outside the arenas of public debate and legislative action."

[36] Keith Schneider, *Dr. Jack Kevorkian Dies at 83; A Doctor Who Helped End Lives*, N.Y. TIMES (June 3, 2011), https://www.nytimes.com/2011/06/04/us/04kevorkian.html.

[37] *Kevorkian*, 639 N.W.2d at296.

[38] CBS News: 60 Minutes, An Interview with Dr. Jack Kevorkian https://www.youtube.com/watch?v=BiZKY6FSfwA; *See also* ALS Association, What is ALS? https://www.als.org/understanding-als/what-is-als (last accessed Oct. 27, 2022). "ALS, or amyotrophic lateral sclerosis, is a progressive neurodegenerative disease that affects nerve cells in the brain and spinal cord… As this area degenerates, it leads to scarring or hardening ("sclerosis") in the region. Motor neurons reach from the brain to the spinal cord and from the spinal cord to the muscles throughout the body. The progressive degeneration of the motor neurons in ALS eventually leads to their demise. When the motor neurons die, the ability of the brain to initiate and control muscle movement is lost. When voluntary muscle action is progressively affected, people may lose the ability to speak, eat, move, and breathe."

[39] CBS News: 60 Minutes, *supra* note 38.

[40] *Kevorkian* 639 N.W.2d at 303.

[41] *Id.* The court held that, "Defendant's argument that the people have reserved the right to euthanasia under the Ninth Amendment and its Michigan counterpart is basically formless. He states that a right to be free from inexorable pain and suffering "must be among" the rights protected by these two constitutional provisions. Further, he argues that states "should recognize such a right and give it force." Defendant does not cite a single case for this extraordinary request." The court further held that "It is not enough for an appellant in his brief simply to announce

administered the lethal injection to Youk – did not sanction euthanasia, the assisted death of Youk was illegal, and Kevorkian was ultimately convicted of second-degree murder and sentenced to concurrent prison terms of ten to twenty-five years.[42]

B. Death with Dignity

In the statutory context, Death with Dignity refers to codified legislation that permits "an end of life option that allows certain eligible individuals to legally request and obtain medications from their physicians to end their life in a peaceful, humane, and dignified manner."[43] At the time of writing, "dying with dignity" is legal in eleven states and jurisdictions in the U.S.[44]

Oregon was the first state to adopt a Death with Dignity Act (DWDA),[45] and the state places restraints on who can assert a right to die with dignity under the state law:

> To participate, a patient must be: (1) 18 years of age or older, (2) capable of making and communicating health care decisions for him/herself, and (3) diagnosed with a terminal illness that will lead to death within six months. It is up to the attending physician to determine whether these criteria have been met. As of March 2022, the Oregon Health Authority is no longer enforcing the DWDA's residency requirement.[46]
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> The state of Oregon does not collect information about the costs of utilizing its DWDA statute nor does the statute specify who must pay for services under the act.[47] It also does not intimately regulate the use of the statute by patients and physicians, unless there is cause for investigation into claims of noncompliance.

The law does not include any oversight or regulation that is distinct from what is done for other medical care. The DWDA assigned the Oregon Health Authority (OHA) the responsibility of keeping track of data on participation and issuing an annual report but did not assign any specific regulatory responsibilities. OHA does not investigate whether patients met the DWDA criteria, nor how their diagnosis, prognosis, and treatment options were determined. OHA does not interpret the statute, other than the portion related to the reporting requirements. However, if any instances of non-compliance are found in the

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a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow. Failure to brief a question on appeal is tantamount to abandoning it," citing the Supreme Court of Michigan in Mitcham v. Detroit, 94 N.W.2d 388, 388 (Mich. 1959).

[42] *Id* at 291. Kevorkian was also sentenced to seven years for his controlled substance conviction.

[43] *Frequently Asked Questions*, DEATH WITH DIGNITY, https://deathwithdignity.org/resources/faqs/ (last accessed Oct. 26, 2022).

[44] *In Your State*, DEATH WITH DIGNITY, https://deathwithdignity.org/states/ (last accessed May 5, 2023). The states and jurisdictions with a Death with Dignity statute are California, Colorado, New Jersey, New Mexico, Hawai'i, Oregon, Maine, Montana, Vermont, Washington. and Washington D.C. Pennsylvania and New York are considering Death with Dignity legislation.

[45] Death with Dignity, *supra* note 19.

[46] Oregon Health Authority, *Frequently Asked Questions*, STATE OF OREGON, https://www.oregon.gov/oha/ph/providerpartnerresources/evaluationresearch/deathwithdignityact/pages/faqs.aspx (last accessed Oct. 27, 2022). Oregon's DWDA does not permit euthanasia.

[47] *Id*.

information received by OHA, it is reported to the Oregon Medical Board for further investigation.[48]

The law requires that the patient voluntarily request a prescription under the DWDA on their own behalf; family members cannot request participation in the DWDA on behalf of the patient.[49] Patients always retain the right to rescind a request to participate in the DWDA.[50]

Though a majority of Oregon voters supported the DWDA in 1994,[51] the Act did not traveled through the political or legal landscapes unscathed. The statute faced opposition from public and religious groups as well as federal legal action seeking injunction under the Controlled Substances Act (CSA).[52] In 1971, the Attorney General promulgated a rule which required that Schedule II substances be prescribed "for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice."[53]

In 2001, the Attorney General issued an interpretive rule in response to Oregon's Death with Dignity Act, which declared that under the CSA, "using controlled substances to assist suicide is not a legitimate medical practice," and "dispensing or prescribing them for this purpose is unlawful."[54] On a challenge to the rule, the trial court enjoined enforcement of the Act.[55] On appeal, the Ninth Circuit invalidated the rule and concluded that the plain language of the CSA did not permit the Attorney General to prohibit doctors from prescribing regulated drugs to patients seeking to opt out in states where the choice may be legally made.[56] The Supreme Court granted the Government's petition for certiorari and affirmed the Ninth Circuit's holding, concluding that the CSA "did not grant expansive federal authority to regulate medicine by defining scope of legitimate medical practice, in view of the CSA's silence on the practice of medicine generally and its recognition of state regulation of the medical profession."[57] Thus, Oregon's Death with Dignity Act was saved.

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[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Death with Dignity Act History*, OREGON GOV'T, (https://www.oregon.gov/oha/PH/PROVIDERPARTNERRESOURCES/EVALUATIONRESEARCH/DEATHWITHDIGNITYACT/Documents/History.pdf) (last visited Oct. 28, 2022). "The Oregon Death with Dignity Act (DWDA) was a citizen's initiative first passed by Oregon voters in November 1994 with 51% in favor."
[52] *Id.* ("Implementation was delayed by a legal injunction, but after proceedings that included a petition denied by the United States Supreme Court, the Ninth Circuit Court of Appeals lifted the injunction on October 27, 1997. In November 1997, a measure asking Oregon voters to repeal the Death with Dignity Act was placed on the general election ballot (Measure 51, authorized by Oregon House Bill 2954). Voters rejected this measure by a margin of 60% to 40%, retaining the Death with Dignity Act. After voters reaffirmed the DWDA in 1997, Oregon became the first state allowing this practice. On November 6, 2001, U.S. Attorney General John Ashcroft issued a new interpretation of the Controlled Substances Act, which would prohibit doctors from prescribing controlled substances for use under the DWDA. After multiple hearings and appeals, the Oregon DWDA was upheld and remains in effect today.").
[53] 21 CFR § 1306.04 (2020).
[54] Gonzales v. Oregon, 546 U.S. 243, 243 (2006).
[55] *Id.* at 244.
[56] *Id.*
[57] *See generally id.* at 269. West Headnote 11.

C. Florida Law

Florida recognizes the right to refuse or terminate life-preserving medical care.[58] This issue was the source of intense public debate during the latter half of the 1990s through the early 2000s, as the matter of Terri Schiavo—a woman who fell into a persistent vegetative state after suffering cardiac arrest—played out in the state and national news.[59] Courts ultimately found in favor of Terri's husband who decided to have her feeding tube removed after fifteen years.[60]

Florida prohibits all individuals from assisting in one's decision to opt out.[61] In 1997, the Florida Supreme Court concluded that, contrary to the finding of the trial court, there is a distinction between "the right to refuse medical treatment and the right to commit physician-assisted suicide through self-administration of a lethal dose of medication," with the latter being impermissible under state law.[62] The key difference, according to the court, is the affirmative step taken to end a life in the latter scenario. The court has previously refused to allow the state to prohibit affirmative medical intervention in the context of abortions (which necessarily involve the termination of life),[63] due to a lack of sufficiently compelling government interests as presented by the state. In *Krischer v. McIver*, however, the court—drawing upon *Washington v. Glucksberg*— found that the state's interests in: (1) the preservation of life; (2) preventing suicide; and (3) maintaining the integrity of the medical profession[64] outweighed the individual liberty of a terminal patient to opt out. While the court ultimately reversed the trial court's finding that opting out is permissible under state law, it also declined to hold that "a carefully crafted statute

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[58] FLA. STAT. § 765.102(1) (2022). "The Legislature finds that every competent adult has the fundamental right of self-determination regarding decisions pertaining to his or her own health, including the right to choose or refuse medical treatment. This right is subject to certain interests of society, such as the protection of human life and the preservation of ethical standards in the medical profession." *See also* Schiavo ex rel Schindler v. Schiavo, 358 F.Supp.2d 1161, 1161 (M.D. Fla. 2005).

[59] Radhika Chalasani, *A Look Back: The Terri Schiavo Case*, CBS NEWS, (March 31, 2016), https://www.cbsnews.com/pictures/look-back-in-history-terri-schiavo-death/18/. ("From 1995, Schiavo's husband began fighting to allow his wife to die. No doctor who examined Terri believed she had a chance to recover. Terri's family vehemently disagreed, producing a bitter family struggle that became very public as the fight was taken to the courts.").

[60] *Id.*

[61] FLA. STAT. § 782.08 (2022). (The statute provides that "[E]very person deliberately assisting another in the commission of self-murder shall be guilty of manslaughter, a felony of the second degree, punishable as provided in s. 777.082, s. 775.083, or s. 775.084.").

[62] Krischer v. McIver, 697 So.2d 97, 102 (Fla. 1997). In this case, a patient became terminally ill by contracting AIDS via blood transfusion; he sought, along with his doctor, declaratory judgment that Fla. Stat. § 782.08 violated the federal and state constitutions.

[63] *Id.* at 102 ("We have previously refused to allow the state to prohibit affirmative medical intervention, such as the case with the right to an abortion before viability of the fetus, only because the state's interests in preventing the intervention were not compelling.").

[64] *Id.* at 103. In relevant part, regarding the state interest in preventing suicide, the court noted that, "those who attempt suicide—terminally ill or not—often suffer from depression or other mental disorders… Research indicates, however, that many people who request physician-assisted suicide withdraw that request if their depression and pain are treated."

authorizing assisted suicide would be unconstitutional."[65] The court ultimately held that the permissibility of opting out under state law was a question to be determined by the legislature.[66]

In 2020, a Bill was introduced in the Florida Senate for the first time with the aim of adopting a "Death with Dignity Act."[67] The Bill was indefinitely postponed, withdrawn from consideration, and died in committee.[68] A renewed attempt to enact a DWDA similarly failed in the Florida Legislature in 2023.[69] In relevant part, the Bill provided that:

> The Legislature finds that every competent adult has the fundamental right of self-determination regarding decisions pertaining to his or her own health, and recognizes that for some faced with a terminal condition, prolonging life may result in a painful or burdensome existence. It is the intent of the Legislature to establish a procedure to allow a competent individual who has a terminal condition, and who makes a fully informed decision that he or she no longer wants to live, to obtain medication to end his or her life in a humane and dignified manner.[70]

In the 2025 legislative session, the Florida End-of-Life Options Act was introduced in the state House of Representatives with a companion bill in the senate.[71] Eligibility under the bill includes state residency, diagnosis of a terminal condition, oral and written requests, waiting periods, and the ability to rescind requests at any time.[72] The bill summary further provides that:

> [The] bill introduces new provisions regarding the responsibilities of healthcare providers, ensuring they verify the patient's condition and mental capacity while documenting all requests in the medical record. It mandates that at least one witness to the patient's request must not have a financial interest in the patient's estate. The legislation also addresses the disposal of unused medication, stipulates that death certificates must list the terminal condition as the cause of death, and protects healthcare providers from penalties for refusing to participate in the act. It clarifies that actions taken under this chapter do not constitute suicide or homicide, thereby safeguarding providers from prosecution.[73]

The state legislature did enact a Bill in 2015 – known as the "Right to Try Act" – which allows terminally ill patients to obtain from a physician a prescription for an experimental drug that has

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[65] *Id.* at 104.
[66] *Id.* ("However, we have concluded that this case should not be decided on the basis of this Court's own assessment of the weight of the competing moral arguments. By broadly construing the privacy amendment to include the right to assisted suicide, we would run the risk of arrogating to ourselves those powers to make social policy that as a constitutional matter belong only to the legislature.").
[67] 2020 Fla. S. Death with Dignity Act. SB 1800 (died in committee).
[68] *Id.*
[69] *Timeline of Death With Dignity in Florida*, DEATH WITH DIGNITY, 1, 1 (2024), https://deathwithdignity.org/states/florida/. SB 864/HB 1231 were introduced and assigned to committees in February, 2023, but did not advance by the close of the legislative session.
[70] 2023 Fla. S. A bill to be entitled. SB 864 (died in committee).
[71] 2025 Fla. H. Florida End-of-Life Options Act. HB 471.
[72] *Id.*
[73] *Id.*

not been approved for general public use by the USFDA.[74] While patients obtaining a prescription under this Act must acknowledge and consent to the possibility that, "new, unanticipated, different, or worse symptoms might result and death could be hastened," as a result of using the prescribed drug, the purpose of the drug is to attempt to treat or reverse an otherwise terminal illness.[75] Effectively, the law provides a last ditch attempt at life. As this law is not part of a regulatory scheme that permits one to opt out contingent on them first seeking an experimental, potentially curative prescription for their terminal illness, on its face it is not a barrier to Death with Dignity legislation. However, it fails to mitigate two critical concerns. First, prescriptions obtained under the Act may lead to death. The uncertainty of that outcome limits the ability of one to make fully informed decisions in their end-of-life planning and could lead to a death in which one experiences a diminished sense of dignity than they otherwise would have, had they been able to decisively choose to opt out. Second, a person may only seek a prescription under this Act for a terminal illness.[76] Those suffering with life-debilitating illnesses or diseases that are not classified as terminal by a physician cannot avail themselves of this legislation.[77] Therefore, while this law supports autonomy to a degree, it does not empower autonomous medical decision-making to the extent permitted under Death with Dignity legislation and called for by its advocates.

II. Antitrust Law

The Federal Trade Commission asserts that "aggressive competition among sellers in an open marketplace gives consumers – both individuals and businesses – the benefits of lower prices, higher quality products and services, more choices, and greater innovation."[78] Even the Supreme Court has held that "[t]he heart of our national economy has long been faith in the value of competition."[79] There are three major antitrust laws enforced by the Federal Government: the Sherman Antitrust Act, the Clayton Act, and the Federal Trade Commission Act.[80]

The Sherman Antitrust Act[81]

This Act outlaws all contracts, combinations, and conspiracies that unreasonably restrain interstate and foreign trade. This includes agreements among competitors to fix prices, rig bids, and allocate customers, which are punishable as criminal felonies. The Sherman Act also makes it a crime to monopolize any part of interstate commerce. An unlawful monopoly exists

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[74] FLA. STAT. § 499.0295 (2015). This section is also known as the "Right to Try Act," and defines an eligible patient as one who "(1) Has a terminal condition that is attested to by the patient's physician and confirmed by a second independent evaluation by a board-certified physician in an appropriate specialty for that condition; (2) Has considered all other treatment options for the terminal condition currently approved by the United States Food and Drug Administration; (3) Has given written informed consent for the use of an investigational drug, biological product, or device; and (4) Has documentation from his or her treating physician that the patient meets the requirements of this paragraph."

[75] FLA. STAT. § 499.0295(2)(d)(4) (2015).

[76] FLA. STAT. § 499.0295 (2022).

[77] *Id*.

[78] *Guide to Antitrust Laws*, FED. TRADE COMM'N (last accessed Dec. 9, 2022), https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws.

[79] Nat'l Soc'y Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978).

[80] Antitrust Div., *The Antitrust Laws*, DEPT. OF JUSTICE, https://www.justice.gov/atr/antitrust-laws-and-you (last updated Dec. 20, 2023).

[81] *Id. See also* 15 U.S.C. §§ 1-38 (2006).

when one firm controls the market for a product or service, and it has obtained that market power, not because its product or service is superior to others, but by suppressing competition with anticompetitive conduct. The Act, however, is not violated simply when one firm's vigorous competition and lower prices take sales from its less efficient competitors; in that case, competition is working properly.

The Clayton Act[82]

This Act is a civil statute (carrying no criminal penalties) that prohibits mergers or acquisitions that are likely to lessen competition. Under this Act, the Government challenges those mergers that are likely to increase prices to consumers. All persons considering a merger or acquisition above a certain size must notify both the Antitrust Division and the Federal Trade Commission. The Act also prohibits other business practices that may harm competition under certain circumstances.

The Federal Trade Commission Act[83]

This Act prohibits unfair methods of competition in interstate commerce, but carries no criminal penalties. It also created the Federal Trade Commission to police violations of the Act.

Section four of the Clayton Act works in tandem with the Sherman Act in that it creates a private cause of action for violations of the Sherman Act.[84]

Most states also have antitrust statutes.[85] Florida's statutes are complementary to the federal laws, particularly the Sherman Act, and prohibit "[e]very contract, combination, or conspiracy in restraint of trade or commerce" in the state as unlawful.[86] These statutes aim to regulate private action and its impact on the public and, in that regard, have been analyzed robustly.[87] Where they lack is in their applicability to the state, which is also capable of and engages in anti-competitive conduct.[88] This is not a blind spot in the existing regulatory framework but rather a gaping hole that has been intentionally left open by the "state action immunity doctrine."[89] This doctrine applies the interpretive canon of expressio unius – the expression of one thing is the exclusion of

[82] *Id. See also* 15 U.S.C. §§ 12-27 (2006).
[83] 15 U.S.C. §§ 41-59 (2006).
[84] Benitez v. Charlotte-Mecklenburg Hosp. Auth., 992 F.3d 229, 233 (4th Cir. 2021).
[85] Fed. Trade Comm'n, *supra* note 22.
[86] FLA. STAT. § 542.18 (2022).
[87] Jarod M. Bona, *The Antitrust Implications of Licensed Occupations Choosing Their Own Exclusive Jurisdiction*, 5(2) U. ST. THOMAS J. L. & PUB. POL'Y 28, 29 (2011).
[88] Jarod Bona, *Applying the Antitrust Laws to Anticompetitive State and Local Government Conduct,* THE ANTITRUST ATTORNEY BLOG (Sep. 1, 2019), https://www.theantitrustattorney.com/applying-antitrust-laws-anticompetitive-state-local-government-conduct/ (provides the example of state licensing boards which "engage in all sorts of anticompetitive conduct from limiting limit the number of taxi-cab medallions in a city to professional advertising restrictions to actual price or opt out restrictions").
[89] Parker v. Brown, 317 U.S. 341, 351 (1943). The Court found that, "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress. The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.")

the other – to the Sherman Act and holds that, because the statute does not speak on state conduct in restraint of trade, states are exempt from liability under the Act.[90]

In response to the wellspring of local government liability created by case law recognizing state but not municipal government immunity under the Act,[91] Congress amended the Sherman Act to "exempt local government entities from liability for damages arising under the antitrust statute."[92] The Act as amended is interpreted to "preclude lawsuits seeking injunctive relief."[93] The result of this case law is that "state and municipal authorities are immune from federal antitrust lawsuits for actions taken pursuant to a clearly expressed state policy that, when legislated, had foreseeable anti-competitiveness effects."[94] Florida also bars suits for damages, injunctive relief, and criminal penalties against local governments under its antitrust statutes.[95]

III. Contextualizing the Issue

While Oregon's Death with Dignity Act amassed vast public attention in the late 2010s because of the advocacy of a twenty-nine-year-old participant who was diagnosed with incurable brain cancer,[96] the most recent report published by the Oregon Health Authority shows that most participants are aged sixty-five or older.[97]

Consider the case of Peter Fernald. Once a faculty member at the University of New Hampshire, the former psychology professor had a pragmatic view on death. "I want my friends and family to remember me not as a crippled, helpless vegetable, but rather as they knew me during my more vibrant healthy moments."[98] Peter passed in 2021 from incurable lymphoplasmacytic lymphoma (a low-grade, non-Hodgkin lymphoma),[99] at home in New Hampshire – a state whose motto of "Live Free or Die," carried a grim irony for the octogenarian.

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[90] *Id.*
[91] Benitez v. Charlotte-Mecklenburg Hosp. Auth., 992 F.3d 229, 234 (4th Cir. 2021).
[92] *Id.* (The court also noted that "the Act was [amended] to prevent taxpayers from bearing the financial of their local governments' anticompetitive activity and to allow local governments to effectively govern without devoting significant time and resources to antitrust litigation.")
[93] *Id.*
[94] *State Action Antitrust Immunity*, CORNELL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/state_action_antitrust_immunity (last updated June 2024).
[95] FLA. STAT. § 542.235 (2024).
[96] Nicole Weisensee Egan, *Terminally Ill Woman Brittany Maynard Has Ended Her Own Life*, PEOPLE, https://people.com/celebrity/terminally-ill-woman-brittany-maynard-has-ended-her-own-life/ (last updated May 9, 2017).
[97] *Death with Dignity Act 2023 Data Summary*, OR. HEALTH AUTH. PUB. HEALTH DIV., CTR. FOR HEALTH STAT., OR. (2024) ("In 2023, 560 people were reported to have received prescriptions under the DWDA. As of January 26, 2024, OHA had received reports of 367 people who died in 2023 from ingesting the prescribed medications, including 30 who had received prescriptions in previous years. Demographic characteristics of DWDA patients were similar to those of previous years: most patients were age 65 years or older (82%) and white (94%). The most common diagnosis was cancer (66%), followed by neurological disease (11%) and heart disease (10%). OHA made no referrals to the Oregon Medical Board for failure to comply with DWDA reporting requirements.") https://www.oregon.gov/oha/ph/providerpartnerresources/evaluationresearch/deathwithdignityact/Documents/year26.pdf.
[98] Peter Fernald, *Live Free and Die – Peacefully*, DEATH WITH DIGNITY, https://deathwithdignity.org/stories/peter-fernald-live-free-and-die-peacefully-4/ (last visited Oct. 26, 2022).
[99] Ned Megargee, *In Memory – Peter Fernald*, AMHERST MAG., https://www.amherst.edu/news/magazine/in_memory/1958/peterfernald (last visited May 5, 2023).

Peter suffered from both heart disease and cancer.[100] In a state with no legislation permitting physician-assisted death, he saw two options for himself: legally discontinue his medical treatment (pacemaker deactivation and no further lung fluid drainage), or to voluntarily stop eating and drinking (VSED).[101] A third option presented to all folks suffering from terminal or life-debilitating illnesses in states without a Death With Dignity Statute is to continue medical treatment as the illness grows progressively worse; essentially, waiting for the body to fail. In Peter's view, the state motto presents a false binary – "Live Free and Die Peacefully," is the option he advocated for.[102] What he wanted, ultimately, was comprehensive autonomy in his end-of-life medical decision-making.

IV. Analysis

A. Rationality, Reason, and a Fundamental Right

In *Washington v. Glucksberg*, the Supreme Court declined to interpret the Constitution as reserving the right to opt out to the individual.[103] Where the scaffolding of this decision falls away is not in its result, but in its process. The structure is unsound.

In *Glucksberg*, the Court applied rational basis — a test that lower courts have since applied to cases involving infringements by the government on individual liberty that do not involve protected classes or fundamental rights, in which state interests are weighed against those of the individual. Rational basis requires only that the law could have been rationally related to a legitimate government interest when adopted.[104] In *Glucksberg*, the Court concluded that the government satisfied this test.[105]

The main state interests evaluated in cases that examine the right to opt out are: (1) preservation of life; (2) preventing suicide; (3) the integrity of the medical profession; and (4) protecting vulnerable populations from abuse and undue influence. These interests are not without merit. The first two, however, imbue the analysis with a level of paternalism that – if it were removed – might elicit a different outcome. They assume, in Orwellian fashion, that the government knows best – even in matters that are extremely personal, like being faced with an incurable, debilitating disease that progressively inhibits one's ability to enjoy life.

The first interest also presents an incongruity worth noting. That is, in states that permit capital punishment, like Florida, courts have asserted that the state has an "unqualified interest in preserving life,"[106] while also upholding the legality of punitive life termination. So strong is the state's interest in protecting life, that it "may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual,"[107] yet, the state may still exercise its authority to terminate a life on punitive grounds. This reasoning illustrates a metaphorical arrow always pointing away from individual autonomy. That is not to say that because Florida permits capital punishment it should not act in ways that

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[95] Fernald, *supra* note 96.
[101] *Id.*
[102] *Id.*
[103] 521 U.S. at 719.
[104] Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1651, 1651 (2016).
[105] *Washington*, 521 U.S. at 703.
[106] Krischer v. McIver, 697 So. 2d 97, 103 (Fla. 1997).
[107] Cruzan v. Dir. Mo. Dep't of Health, 497 U.S. 261, 282 (1990).

protect life elsewhere. Rather, the state should formally recognize a right to autonomy in medical decision-making where one's choice is rationally in their competent, self-determined best interest based on their health.

The interest in maintaining the integrity of the medical profession can be upheld while still allowing for self-determination in medical end-of-life planning. As shown in the Oregon Death with Dignity Statute and in the text of the DWDA proposed in the Florida Legislature, ethical safeguards can be embedded into legislation.[108] Likewise, the interest in protecting vulnerable populations from coercion and undue influence – possibly the most poignant – can be upheld while permitting comprehensive autonomy through careful and precise legislation.[109]

Judicial treatment of the distinction between negative and affirmative rights (i.e., the right to refuse treatment versus the right to receive medication that would affect one's choice to opt out) is not sufficiently coherent in this context, but appears rather attenuated at best.

Note also that in *Glucksberg* the Court applied rational basis – as opposed to strict scrutiny, which requires that the government prove its actions were narrowly tailored to a compelling interest and used the least restrictive means to achieve that interest[110] – after it concluded that the right to opt out was not fundamental because it was not "deeply rooted in the [n]ation's history and tradition."[111] A critical question arises under such analysis – at what depth is something sufficiently "rooted" in history and tradition? That question came up recently when, in 2022, the Supreme Court overturned fifty years of precedent and held that there is no constitutional right to abortion.[112] The answer thus remains imprecise.

Since *Glucksberg*, the Supreme Court of the United States has held that the "identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the constitution," and that responsibility "has not been reduced to any formula," but rather, "it requires courts to exercise reasoned judgement in identifying interests of the person so fundamental that the State must accord them its respect."[113] This means that "history and tradition guide and discipline this inquiry but do not set its outer boundaries," resulting in an analytical mode that "respects our history and learns from it without allowing the past alone to rule the present."[114] The reasoning of this conclusion is echoed in the development of the rational basis test in equal protection cases, which the Court has applied nominally since *Glucksberg*, but in a manner that has effectively shown it is willing to apply a heightened version of the standard where state action infringes on constitutional rights. The Court has elsewhere proven a willingness to depart from the mandates of *stare decisis*.[115]

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[108] OR. REV. STAT. §§ 127.800-97 (2021).

[109] Recall Oregon's Death with Dignity eligibility requirements. A request to for assistance under the act must be made by the patient and no one else.

[110] *Strict Scrutiny*, CORNELL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/strict_scrutiny#:~:text=Strict%20scrutiny%20is%20a%20form,national%20origin%2C%20and%20alienage) (last updated September 2024).

[111] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2229 (2022).

[112] *Id.* at 2234.

[113] Obergefell v. Hodges, 576 U.S. 644, 663-64 (2015).

[114] *Id.*

[115] *See generally Id.; See also* Cleburne v. Cleburne Living Center, 473 US 432, 433, 446 (1985), where the Court held that a city's requiring a special needs group home to obtain a special use zoning permit appeared to "rest on an irrational prejudice against the mentally [disabled], including those who would occupy the proposed group home" and, additionally, that "the State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *See generally* Dobbs, 142 S.Ct. at 2234, where the Court overturned five decades of precedent and held that there is no constitutional right to abortion.

Thus, the balancing test in *Glucksberg* could have been properly applied and yet come out in favor of individual liberty if the Court required more than a mere justification from the State. That it didn't presents a question of whether and how the doctrine of preemption should operate when a liberty interest – though not expressly enumerated in the Constitution – is at issue. It follows that, the Constitution being the supreme law of the land,[116] a liberty interest that exists at the edges of its text if not implicitly within, should trigger heightened regard for the individual when their liberty is infringed upon, and the state should be required to prove more than whether it could have had a reason for the infringement.

Separately, leaving the decision to the discretion of the states, as the Court did in *Glucksberg*, denies that the right is fundamental. The Supreme Court declined to acknowledge a right to opt out in *Glucksberg* not because it could not conceive of its existence, but rather because it had not been looked upon favorably in history. Yet, to deny that a right exists because previous generations have not acknowledged it is intellectually lethargic. Given that courts may use reasoned decision-making to identify fundamental rights contemporaneously with their decisions,[117] this Note asserts that the Court erred in declining to establish a fundamental right to opt out in *Glucksberg*. Had it done so, state efforts to prohibit individuals from seeking medical aid in opting out would be preempted by the Constitution. It defies reason that one should be prevented from seeking to pass on from this world with dignity and the assistance of medical aid even if they suffer with a terminal or unimprovable, debilitating illness.

V. Discussion

A. A Matter of Interpretation

The Fourteenth Amendment supports the acknowledgment of a right to autonomy in medical decision-making because of its promise that citizens shall not be deprived of life, liberty, or the pursuit of happiness without due process of law.[118] While it is implicit in the Constitution that a right to liberty includes a right to determine the manner of one's death when life deteriorates beyond enjoyment, it is neither explicit nor implied in the Constitution that states have the power to prevent one from making that choice with dignity. Current posture permits the deprivation of one's liberty to exercise autonomy over how they choose to end their life – not on the basis of law, but on the absence of law to the contrary. This is an incomplete definition of the parameters of the Fourteenth Amendment which this Note argues should be discontinued. The Tenth Amendment provides that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[119]

While the federal and state governments should protect the right to opt out, it is ultimately reserved to the people specifically and exclusively. The current posture that states are allowed to take effectively deifies them, attributing to themselves the role of both creator and destroyer. They are, in other words, allowed to separate life from death – subjugating the individual to incarceration

[116] Marbury v. Madison, 5 U.S. 137, 180 (1803). "Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument."
[117] *Obergefell*, 576 U.S. at 663.
[118] U.S. CONST. amend. XIV.
[119] U.S. CONST. amend. X.

within their own person (or, in other words, to a death without dignity). This contravenes the very spirit of liberty upon which this country and its jurisprudence is founded.

B. Analogizing to the Supremacy Clause

Article VI, Paragraph 2 of the Constitution, generally referred to as the Supremacy Clause, establishes the primacy of federal law over state law. In matters where the two conflict, federal law supersedes.[120] This implies a dual, hierarchical construction of American citizenship. In one respect, Americans are citizens of the United States and subject to its federal laws. In another, Americans are citizens of the states in which they reside and are subject to those state laws. While state citizenship can change with relative ease, an American citizen remains as such regardless of which U.S. state they reside in. This Note asserts that because of this "dual citizenship," rights that are not denied at the federal level should not be denied at the state level. As the current posture of the Supreme Court is that it is up to the states to determine whether one can opt out, the right remains unprohibited at the federal level and should, therefore, be enjoyed in all states by all citizens.

C. Pulling from Principles of Anti-Trust Law

The posture of the courts illustrated above has identified but not resolved a tension between the goals of antitrust law and the principles of federalism.[121] States derive "police powers" which allow them to regulate public affairs from the Tenth Amendment,[122] and currently enjoy immunity under the "state action immunity doctrine," which holds that because the Sherman Act is silent on state conduct in restraint of trade, states are exempt from liability under the Act.[123]

By the express language of the Constitution in the Supremacy Clause, where state and federal law conflict, the state must bow.[124] State regulation of any market effectively restrains competition; "[r]ent control, conservation measures, and occupational licensing, for example, fix prices, restrict output, and exclude entry."[125] In many circumstances, such action by the state works for the public good. Still, tension exists because "regardless of the regulatory motive…the regulation has rejected the antitrust premise that what is in the public interest is competition – specifically that brand of competition prescribed by federal antitrust law."[126] Accordingly, "the role of antitrust state doctrine under this paradigm is thus to reach an appropriate accommodation between the federal

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[120] U.S. CONST. art. VI, para. 2.
[121] Einer Richard Elhauge, *The Scope of Antitrust Process*, 104(3) HARV. L. REV. 667, 668-69 (1991). Elhauge argues that "A paradigm of conflict and accommodation dominates current understanding of antitrust state action doctrine…The role of antitrust state action doctrine under this paradigm is thus to reach an appropriate accommodation between the federal interest in fostering competition and the conflicting state interests in restricting competition by immunizing some, but not all, state-authorized or enforced restraints from antitrust scrutiny."
[122] *Police Powers*, CORNELL LEGAL INFORMATION INSTITUTE. (Dec. 2020), https://www.law.cornell.edu/wex/police_powers
[123] Cornell Legal Information Institute, *supra* note 92.
[124] U.S. CONST. art. VI, para. 2. *See also* Einer Richard Elhauge, *The Scope of Antitrust Process*, 104(3) HARV. L. REV. 667, 669 (1991). "The very meaning of the supremacy clause is that conflicts between federal and state law must be resolved in favor of federal law. This principle is fully applicable to conflicts involving federal antitrust law."
[125] *Id.* at 668.
[126] *Id. at* 669.

interests in restricting competition by immunizing some, but not all, state authorized or enforced restraints from antitrust scrutiny."[127]

The healthcare industry is estimated to account for 18% of the U.S. economy, a number that – except for China, Japan, and Germany – exceeds the size of the world's other economies.[128] Elder Americans ages sixty-five and older accounted for 34% of all healthcare spending in the U.S. in 2014.[129] These numbers suggest that a subset of the healthcare market that has not yet emerged due to state imposed prohibitions, but that would accommodate a current need in the marketplace, would certainly trigger antitrust law protections and regulations. If New Hampshire permitted its citizens to seek medical aid in dying, by the law of supply and demand a sub-market within the healthcare sector would emerge to support elders like Peter Fernald. Not only would he have had access to the aid required to opt out with dignity, but he would also have had a choice in which providers he sought that aid from, which insurance carriers and plans he was a member of and where he ultimately received the aid (possibly at home through a palliative care program, for example). Regulation of this sub-market under antitrust law would ensure competition and fair prices to the benefit of patients like Peter.

By Florida prohibiting the right to opt out, it prohibits the emergence of a market to facilitate access to that right. This state prohibition is therefore inherently anti-competitive and impermissibly inconsistent with federal antitrust law goals and principles, due to the constitutional analysis supporting recognition of opting out as a fundamental right. Thus, two more questions arise. First, what metric does the state use when permitted to exercise discretion in determining whether a market should or should not exist? Second, for rights on the periphery of the constitution or otherwise characterizable as emergent, should the courts decline to grant immunity to states in challenges to state actions on antitrust grounds? While the first question is currently unanswered, this Note asserts that the answer to the second is yes.

D. Counter Arguments

Opponents of the right to opt out may argue that allowing the exercise of this right will lead to a slippery slope to the particular detriment of vulnerable communities like the elderly. While all laws and markets in the economy have facets that impact various groups differently, these undesirable impacts can be mitigated against with carefully planned legislation and interdisciplinary practice at the community health level. It may also be argued that such a policy is against social mores because life is sacred and should be protected. That argument is true and is further support for the right to opt out – life should not be a burden. Further, with clear and comprehensive legislation (like the proposed Death with Dignity Act which died in the Florida legislature), safeguards can be put in place to ensure that this policy is not used as a terminal coping mechanism by those suffering with mental illness. Others may argue that this policy will result in disparate impacts and overuse in certain – possibly marginalized – communities. With the Repeal of the Assisted Suicide Funding Restriction Act of 1997, federal dollars can be appropriated and used for community outreach and education programs to address and mitigate against this concern.

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[127] *Id.*, in reference to the tendency for courts to find in favor of the state in antitrust challenges to state action.
[128] Where is the *U.S.* Healthcare Industry Headed*?,* Kellogg Insight, (Jun. 21, 2022), https://insight.kellogg.northwestern.edu/article/healthcare-economics-why-healthcare-costs-so-much.
[129] Mariacristina De Nardi et al., *Medical Spending of the US Elderly,* NCBI (Nov. 21, 2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6680320/#:~:text=the%20national%20average.-,2,at%20the%20end%20of%20life.

Concerns of mental capacity align with those of overuse or abuse in certain communities, and thus the same remedies of outreach, education, and intentional legislation apply.

E. Recommendation

At the federal level, Congress should legitimize the right to opt out by adopting comprehensive Death with Dignity legislation, repealing the Assisted Suicide Funding Restriction Act of 1997, and allowing social programs like Medicare and Medicaid to be used to make the choice to opt out available to people engaged in end-of-life planning. The Florida legislature should amend section 765.309 of the state statutes, which prohibits all forms of assistance toward ending one's life, to permit medical assistance by a physician. The Supreme Court should, if presented with litigious opportunity (and otherwise Congress should pass a law) suspend state immunity from antitrust scrutiny when fundamental rights are implicated. The Court should also conclude when the opportunity next arises that the right to opt out is fundamental. This will have the dual effect of promoting efficiency in and outside of the courts.

VI. Conclusion

The state holds legitimate interests when it comes to life and death. These interests should be leveraged as tools to craft empowering legislation that allows individuals to exercise comprehensive autonomy in their end-of-life planning. Current Florida law prohibiting the right to opt out violates both constitutional and anti-trust law principles and deprives folks, especially those who are part of the elder population, of the fully realized ability to choose dignity at the end of their life. At the state level, there are two corrective options available: (1) interpret the Constitution liberally and recognize the inherent right to opt out, (2) exercise present authority to permit individuals to seek and assist those seeking to opt out. The same options exist for Congress at the federal level; while, in both instances, the judicial branches are best positioned to empower the people.