

**Due Process Predictions:
The Likely Outcome of *Abigail Alliance v. Von Eschenbach***

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“If liberty means anything at all, it means the right to tell people what they do not want to hear.”

George Orwell

I. Introduction

An analysis of the Supreme Court's holding in *Washington v. Glucksberg*,¹ suggests a possible outcome in a controversial case recently heard *en banc* by the U.S. Court of Appeals for the D.C. Circuit, *Abigail Alliance v. Von Eschenbach*.² There is a striking similarity between these two cases in terms of their legal and jurisprudential arguments. Section two of this paper sets out the facts and holdings of the two cases, and assesses the constitutional arguments involved. Section three examines the holding of *Cruzan v. Director, Missouri Dep't. of Health*,³ a seminal case that figures prominently in the decisions of both *Glucksberg* and *Abigail Alliance*. Based upon the *Glucksberg* analysis and the liberty interest defined in *Cruzan*, I suggest a holding by the D.C. Circuit in favor of the Food and Drug Administration, with Andrew Von Eschenbach as the current Commissioner. These two cases share three salient features. First the plaintiffs represent similar populations: mentally competent, terminally ill individuals who have exhausted all available therapeutic options. Second, a central theme of both is a desire to make personal medical decisions independent of governmental interference. More specifically, both groups seek recognition of a constitutional right that would preempt possible interference. Third, in both cases at least one opinion (the dissent in *Abigail Alliance*, for instance) argued that these are matters are best left to either state legislatures or to Congress.

The two cases diverge on certain points as well. First, the appellants in *Glucksberg* are seeking a certain death, whereas the appellants in *Abigail Alliance* are making an alleged choice for life.⁴ Second, while both are challenging governmental action, this occurs at radically different levels. In *Glucksberg*, the challenge involves a

state statute; in *Abigail Alliance* the challenge involves a powerful regulatory agency, the FDA operating under the authority of a federal statute. Nonetheless, I conclude that the Court of Appeals (or ultimately the Supreme Court) will deliver a holding in *Abigail Alliance* in line with that in *Glucksberg*; namely, that there is no fundamental liberty interest deserving of substantive due process protection.^a

II. A. *Washington v. Glucksberg*

The Supreme Court was asked to review the constitutionality of a Washington State statute prohibiting assisted suicide.⁵ Four physicians, among them Dr. Harold Glucksberg, three terminally ill patients, and a not-for-profit group, Compassion in Dying, brought the challenge.⁶ The petitioners specifically claimed “the existence of a liberty interest protected by the Fourteenth Amendment which extends to a personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide.”⁷ The District Court agreed and the State appealed.⁸ On appeal to the Ninth Circuit, a panel reversed, holding that “in the two hundred and five years of our existence no constitutional right to aid in killing oneself... [has been] upheld by a court of final jurisdiction.”⁹ The Ninth Circuit, rehearing the case *en banc*,¹⁰ took the opposite view, finding a constitutional liberty interest based on previous decisions in *Planned Parenthood of Southeastern Pa. v. Casey*¹¹ and *Cruzan*. The Court stated specifically

^a A few words of clarification are required. *Glucksberg* challenged a *state* statute, and the analysis thus concerns the substantive due process right guaranteed by the Fourteenth Amendment to the Constitution. Conversely, the *Alliance* is challenging a *federal* agency, the FDA; therefore, their substantive due process analysis concerns the Fifth Amendment to the Constitution. Additionally, the *Abigail Alliance* case frequently references the ‘*Glucksberg* analysis’, which is discussed in Section II. This analytical approach for determining whether or not a fundamental right is at stake was so clearly fleshed out in the *Glucksberg* decision, that subsequent courts have deemed this approach the ‘*Glucksberg* analysis’.

that, “the Constitution encompasses a due process liberty interest in controlling the time and manner of one’s death.”¹² The Supreme Court granted certiorari and reversed.

The primary reasoning for reversal lies in what is now referred to as the first prong of the *Glucksberg* analysis, the analytic tool used to determine whether or not a fundamental right at stake. The analysis begins with the question, is the asserted right “deeply rooted in this Nation’s history and tradition?”¹³ Suicide, according to the Court, is not deeply rooted in tradition and history. The Court outlined the negative attitudes toward suicide throughout the opinion.

The second prong poses the question: is the right at stake, such that it is “implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed?”¹⁴ Once again, the Court answered the question in the negative; no liberty interest exists in receiving assistance with suicide. Since no fundamental right is implicated, the State’s burden is lowered; it must show merely that its policies are rationally related to a legitimate governmental purpose, a burden it was able to meet.¹⁵

The other question addressed by the Court is whether the petitioners provided a “careful description” of the asserted right.¹⁶ In other words, the rights established in *Casey* and *Cruzan* were deduced from concrete principles of autonomy, dignity, as well as the more prosaic common-law concept of battery. In the particular set of circumstances in *Glucksberg*, the Court did not find, (unlike the opinion in *Abigail Alliance*), that the petitioners met this careful description requirement. The Court held that even though “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.”¹⁷ This, the Court believed,

was consistent with its holding in *Casey*.¹⁸ Furthermore, the liberty interest in *Cruzan* is “stronger than both the common-law right to refuse medical treatment and the unbridled interest in deciding whether to live or die.”¹⁹ Therefore, taking all of these factor into account, the Court held that the right to assisted suicide is not a fundamental right deserving of due process protection.²⁰

B. Abigail Alliance v. Von Eschenbach

Twenty-one year old Abigail Burroughs was competent, and tragically, terminally ill. She suffered from a lethal type of head and neck cancer, and when conventional treatments proved ineffective she tried, unsuccessfully, to gain access to some promising, investigational drugs.²¹ The FDA would not permit access given the early stage of the drugs’ development. Abigail passed away in June 2001.²²

After her death, her father, Frank Burroughs formed the Abigail Alliance for Better Access to Developmental Drugs (the “Alliance”). In July 2003, this group, along with a conservative public interest group, The Washington Legal Foundation, brought suit against the FDA seeking to enjoin the agency from denying access to post-Phase I experimental drugs for the terminally ill.²³

The extensive, tiered process of drug approval, they asserted, constituted a violation of their substantive due process right to life guaranteed by the Fifth Amendment of the Constitution.²⁴ The District Court refused to recognize a new fundamental right and found that the FDA’s policy was rationally related to a legitimate government interest, and ultimately dismissed the case.²⁵ In May 2006, a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit, reversed, agreeing with the Alliance that the

substantive due process clause was protective in such circumstances, and remanding the case back to the District Court to determine whether or not the FDA's policy was narrowly tailored to serve a compelling government interest.²⁶

Before the case could be remanded to the District Court, the Court of Appeals for the D.C. Circuit vacated its May 2006 decision,²⁷ granting a motion for rehearing on behalf of the FDA. The case was heard *en banc* on March 1, 2007.²⁸ Many legal commentators believe the case ultimately will be heard by the Supreme Court.

The primary challenge faced by the *Abigail Alliance* Court was to determine whether a fundamental right was implicated. And the liberty interest at stake is, of course, the right to life as guaranteed by the due process clause of the Fifth Amendment. Two analytical approaches have been utilized by the Supreme Court to ascertain what rights are, and what rights are not deemed fundamental.²⁹ Based on these precedents, the Court could choose to determine if the alleged right is fundamental by assessing what "personal dignity and autonomy" demand.³⁰ The *Abigail Alliance* Court effectively skirted this approach, opting to focus on the more narrow '*Glucksberg* analysis'.³¹

That analysis, as discussed above, involves an assessment of whether the alleged right is "objectively, 'deeply rooted in this Nation's history and tradition,'"³² and is such that it is "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed."³³ As mentioned above, this analytical approach has come to be known as the '*Glucksberg* analysis', and was adopted by the three-judge panel in this case. As for the "history and tradition" prong, the *Abigail Alliance* majority infers a right to be *free* from drug regulation, given the *lack* of federal regulation in this area for most of our nation's history.³⁴

Underlying the two-pronged *Glucksberg* approach is a need to “ensure that courts do not multiply rights without principled boundaries.”³⁵ Indeed, Courts have been reluctant to ‘create’ and ‘discover’ new fundamental rights. This is crucial to the possible outcome in *Abigail Alliance* since the petitioners seek to infer a new ‘right’ from the ability to merely ‘decide’ whether or not to assume risks (known or unknown) associated with taking investigational drugs. Law professor, Lee Goldman, aptly noted in a discussion of the enlarging swath of new substantive due process rights (such as that found in *Lawrence v. Texas*³⁶), “...several Justices, fearing a return to the *Lochner* era, expressed concern about the potentially unlimited reach of the Court’s expansive language and ad hoc identification of fundamental rights.”³⁷

The analysis also calls for a careful description of the alleged right, a requirement that aims for the most specific level of articulation of the asserted right or violation.³⁸ The Court of Appeals in this case, unlike the Court in *Glucksberg*, determined that the asserted liberty interest on behalf of the Alliance “contains the careful description we seek.”³⁹ The majority found that the Alliance had satisfied the narrow description requirement completely in that “the Alliance claims neither an unfettered right of access to all new or investigational new drugs nor a right to receive treatment from the government or at government expense.”⁴⁰

Once the careful description of a liberty interest is determined, the question shifts to whether or not the FDA’s policies infringe on the protections guaranteed by the due process clause. Furthermore, if the liberty interest is deemed fundamental, which the Court of Appeals in *Abigail Alliance* has found it to be, the burden is then placed on the

FDA to demonstrate that their policy is “narrowly tailored to serve a compelling governmental interest.”⁴¹

The dissent in *Abigail* was troubled by the majority’s opinion, in particular by its having inferred a new fundamental right from abstract concepts of privacy, autonomy, and self-defense. In *Glucksberg*, the Court found such inferences inappropriate.⁴² Much like assisted suicide in *Glucksberg*, the right asserted by the Alliance does not have a long-standing tradition in our nation’s history. The dissent additionally recognized a long-standing tradition of rejecting legal arguments based on an alleged constitutional (affirmative) right to medical treatment.⁴³ In fact, no circuit court has found in favor of an affirmative access claim.⁴⁴

III. The *Cruzan* Precedent and the Liberty Interest at Stake

In 1983, Nancy Beth Cruzan entered a permanent vegetative state after a car accident.⁴⁵ Based on their daughter’s previous statements, her parents sought a declaratory judgment to terminate her nutrition and hydration.⁴⁶ The majority opinion, written by then Chief Justice Rehnquist, held that there is a liberty interest in the right to refuse treatment. This liberty interest plays a crucial role in the analysis below.

The right to refuse treatment is based on the common law notions of battery and informed consent.⁴⁷ Touching without permission is a battery, and if a person does not consent to a certain medical procedure, the physician may be found to have committed a battery. Simply stated, a competent person has a fundamental liberty interest (found within the due process clause of both the Fifth and Fourteenth Amendments) in refusing (to consent to) a medical treatment or procedure.⁴⁸ The Court subsequently recognized

the right to refuse in the case of *Riggins v. Nevada*,⁴⁹ which found a protected liberty “interest in avoiding involuntary administration of antipsychotic drugs.”⁵⁰ The Court held that the liberty interest in determining what one does with one’s body is “deeply rooted in this nation’s history.”⁵¹ Nothing is as sacred as the freedom from bodily interference,⁵² and this right cannot then, without the due process of law, be violated.⁵³ “The inviolability of the person” has been held as “sacred” and “carefully guarded” as any common-law right.⁵⁴ Essentially, to be free of unwanted medical treatment is among the principles “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”⁵⁵ The Court also held that a state may, in fact, require more substantial evidentiary proof (in this case, clear and convincing evidence) of a patient’s desire to terminate treatment in the absence of a living will.⁵⁶

Additionally, the Supreme Court has held that the due process clause “guarantees more than fair process,”⁵⁷ and “accords substantive protection to the rights it guarantees.”⁵⁸ This is crucial to the discussion of the case since some rights are deemed fundamental, and cannot be infringed upon without the burden shifting to the government to show that the infringement is narrowly tailored to serve a compelling interest.⁵⁹ The question remaining is whether a right to assisted suicide and a right to access post-Phase I drugs deserve similar protection and deference.

IV. The Synthesis

A fair assessment is that *Abigail Alliance* will suffer the same fate as *Glucksberg* (i.e., the Court of Appeals will refuse to find a fundamental liberty interest). Perhaps the controversy is not just about a right-to-die or assisted suicide. Perhaps this is not simply about a right to access drugs in the early stages of development. Rather, this may simply

be about personal, bodily control. Specifically, the right the petitioners in both cases seek to *choose* the manner and time of their (relatively imminent) death without interference. The individuals are willing to take risks, even risks that may result in death. They assert this is their choice. As John Stuart Mill notes, “All the errors which a man is likely to commit against advice and warning are far outweighed by the evil of allowing others to constrain him to what they deem is good.”⁶⁰ The issue may also be evaluated as a matter of individual respect; as Charles Fried eloquently wrote, “The man who deliberately deprives me of choice, who manipulates my choices, manipulates me.”⁶¹ With that framework, it is useful to examine the following areas of similarity between *Glucksberg* and *Abigail Alliance*.

A. Populations Involved

In both cases, the petitioners are competent,⁶² terminally ill, and running out of options (this fact is a point of departure from the *Cruzan* case as Nancy Cruzan was, in fact, not competent). All they seek is the ability to make intimate decisions with their treating physician free from governmental interference. However, both are seeking an *affirmative* right, whether it is a right to access a particular therapeutic approach or a right to have assistance in suicide. The Alliance actually interpreted the common-law principles in *Cruzan* to extend to an affirmative right to self-preservation. In other words, if there is a right to refuse treatment, even if it means certain death, there must be an analogous right to take actions one chooses to preserve life.⁶³ However, arguments from analogy rarely work. A careful reading of *Glucksberg* reveals a narrow application of *Cruzan*, one into which *Abigail Alliance* will most likely not fit. The decision in *Cruzan* reflected the urgency and imminence of death, “[the liberty interest] is an interest in

deciding *how*, rather than *whether*, a critical threshold shall be crossed.”⁶⁴ Whereas the Alliance is asking to preserve life over what can be many months or years (assuming the experimental drugs work as intended).

B. Governmental Interests

Strong governmental interests are at stake in both *Glucksberg* and *Abigail Alliance*. It would be difficult for a court to ignore them (and in *Glucksberg* they did not). In both cases there is the role of the state in protecting vulnerable populations (i.e., the terminally ill). In *Glucksberg* there is an additional concern for the fate of the economically disadvantaged and the elderly who might choose assisted suicide as a ‘way out’ or to relieve their families of a perceived burden. The *Glucksberg* Court relied on *Cruzan* to enforce that point, “We have recognized, however, the real risk of subtle coercion and undue influence in end-of-life situations.”⁶⁵ Furthermore, an essential point is that the finding of a liberty interest does not mean there are no restrictions on that interest; “Determining that a person has a ‘liberty interest’ under the due process clause does not end the inquiry; ‘whether the [the individual’s] constitutional rights have been violated must be determined by balancing his liberty interests against relevant state interests.’”⁶⁶ It is on this core issue that the Court may rest: the powerful arguments made on behalf of the public’s interest, safety, and preservation of the clinical trial system.

C. The Physician-Patient Relationship in Jeopardy

Another cause for concern in *Glucksberg*, which is echoed in *Abigail Alliance*, is the need to protect the integrity of the medical profession. As the *Glucksberg* Court deftly states, “physician-assisted suicide could undermine the trust that is essential to the doctor-patient relationship by blurring the time-honored line between healing and

harming.”⁶⁷ Similarly, there is a very real threat to the same relationship in *Abigail Alliance* when the treating physician is assumed the role of researcher, and the patient then becomes a subject. From that imbalance, problematic conflicts of interest may emerge.⁶⁸

D. Legislative Solutions

The final common feature of these two cases is the preference the Courts express for a legislative resolution to these significant issues.⁶⁹ In *Abigail Alliance*, it is explained that Congress has granted the FDA the authority to control and regulate drugs.⁷⁰ Modification of the clinical trial system should be a matter for the legislative process. As Judge Griffith stated in his dissent, “Our Nation’s concept of ordered liberty, along with our traditions and history, do not call for courts to usurp the judgment of the scientific and medical communities, expressed through Congress and the Executive Branch, that science does not warrant allowing the early access to experimental drugs the Alliance demands.”⁷¹ In fact, Senator Sam Brownback, partially in response to the *Abigail Alliance* case, has proposed the “Access, Compassion, Care and Ethics for Seriously Ill Patients Act” (“ACCESS”),⁷² in order to expedite the process for the terminally ill. This is one proposed legislative solution to a delicate and indelible problem.

Similarly, in *Glucksberg*, a number of Justices agreed with a comparable sentiment. As Justice Souter stated, “...which institution, a legislature or a court, is relatively more competent to deal with an emerging issue...the answer has to be...that the legislative process is to be preferred.”⁷³ A similar sentiment is shared in *Cruzan*.⁷⁴ In terms of ascertaining the wishes of a permanently incapacitated individual, Justice

Scalia, in concurrence stated, "...the federal courts have no business in this field...and hence, that even when it *is* demonstrated by clear and convincing evidence that a patient no longer wishes certain measures to be taken...it is up to the citizens of Missouri to decide, through their elected representatives, whether that wish will be honored."⁷⁵

In conclusion, the discussion above examines a number of ways in which the *Glucksberg* precedent may play out in the upcoming *Abigail Alliance* decision. Based upon the narrow way the *Glucksberg* Court interpreted and applied the *Cruzan* precedent, it is unlikely the Court of Appeals will find a liberty interest in accessing post-Phase I drugs. Once again, Charles Fried gets to the heart of the dilemma, "...liberty is only implicated if others deprive me of choice, not if they simply fail to help me or fail to get out of my way."⁷⁶

¹ 521 U.S. 702 (1997). *See also* *Vacco v. Quill*, 521 U.S. 793 (1997), the companion case to *Glucksberg*. Here the Court also did not find a right to assisted suicide issue based on the Equal Protection Clause.

² 445 F.3d 470 (D.C. Cir. 2006).

³ 497 U.S. 261 (1990).

⁴ Of course, the drugs they want access to are so early in the development stage that their death might actually be hastened by access. This, they argue, is their choice to make.

⁵ Washington Revised Code Section 9A.36.060.

⁶ *Glucksberg*, at 709-710.

⁷ *Id.*

⁸ *Compassion in Dying v. Washington*, 850 F.Supp. at 1459-1462.

⁹ *Glucksberg*, at 709 (quoting *Compassion in Dying v. Washington*, 49 F.3d 586, 591 (1995)).

¹⁰ Note that there is procedural similarity to *Abigail Alliance*.

¹¹ 505 U.S. 833 (1992).

¹² *Glucksberg*, at 710 (quoting *Compassion in Dying v. Washington*, 79 F.3d at 813-816).

¹³ *Id.* at 721.

¹⁴ *Id.* *See also* *Palko v. Connecticut*, 302 U.S. 319 (1937).

¹⁵ The State has an interest in protecting the integrity of the medical profession and protecting vulnerable populations from pressure to commit suicide. *Glucksberg*, at 732.

¹⁶ *Id.* at 721. *See also* *Reno v. Flores*, 507 U.S. at 302.

¹⁷ *Id.* at 728. *See also* *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

¹⁸ *Id.*

¹⁹ *Id.* at 804.

²⁰ *Id.*

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- ²¹ Interestingly, the words ‘experimental’, ‘investigational’, and ‘developmental’ are often used interchangeably. Arguably, the latter (i.e., developmental) sounds the least ‘risky’ and perhaps explains why the Alliance chose it.
- ²² Abigail Alliance for Better Access to Developmental Drugs, <http://abigail-alliance.org> (last visited April 11, 2007). Even when the FDA does not stand in the way, small drug companies may be reluctant to risk financial ruin and potential liability by supplying an experimental drug. For a heart wrenching story see Geeta Anand, *Saying No to Penelope*, THE WALL STREET JOURNAL ONLINE, May 1, 2007, at A1.
- ²³ Abigail Alliance for Better Access to Dev. Drugs v. McClellan, 2004 U.S. Dist. LEXIS 29594 (D.D.C., Aug. 30, 2004)
- ²⁴ Abigail Alliance for Better Access to Dev. Drugs v. Von Eschenbach, 445 F.3d 470 (D.C. Cir. 2006).
- ²⁵ *Id.* at 475.
- ²⁶ *Id.* at 486. The compelling interest test is a standard test for substantive due process challenges once a fundamental right has been established. If a fundamental right is not found then the test is called the “rational basis” test where the burden is shifted to the party bringing the suit to show the government action is unconstitutional. Historically, the government has been successful in such disputes.
- ²⁷ Abigail Alliance for Better Access to Dev. Drugs v. Von Eschenbach, 2006 U.S. App. LEXIS 29148 (D.C. Cir. 2006).
- ²⁸ *Abigail Alliance*, 443 F.3d 470 (D.C. Cir. 2006); *hearing en banc granted*, No. 03-CV-01601 (D.C. Cir. Nov. 21, 2006).
- ²⁹ *See Moore v. East Cleveland*, 431 U.S. 494 (1977).
- ³⁰ *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). The *Abigail Alliance* court did not choose this analytical method.
- ³¹ The court averted discussion of clinics, bedrooms and wombs by eliminating this approach. *See Abigail Alliance*, 445 F.3d at 476.
- ³² *Id.* (quoting *Moore*, 431 U.S. at 503; *Snyder v. Massachusetts*, 291 U.S. 97 (1934)).
- ³³ *Id.* (quoting *Glucksberg* 521 U.S. at 721).
- ³⁴ *Abigail Alliance*, at 494. In fact, the dissent traces a long history of attempts at drug regulation and control from Colonial Virginia in the 1700s to the present.
- ³⁵ *Id.* at 476.
- ³⁶ 539 U.S. 558 (2003) (finding a protected liberty interest in consensual sexual conduct and relations).
- ³⁷ LEE GOLDMAN, *The Constitutional Right to Privacy*, 84 DENV. U.L. REV. 601, 607 (2006).
- ³⁸ Remember the careful description concept was first introduced in *Reno*, 507 U.S. at 302.
- ³⁹ *Abigail Alliance*, 445 F.3d at 478.
- ⁴⁰ *Id.*
- ⁴¹ *Id.*
- ⁴² *Id.* at 476 (quoting *Moore*, 431 U.S. at 503; *Snyder v. Massachusetts*, 291 U.S. 97 (1934)). As the dissent notes, fundamental rights may “not [be] simply deduced from abstract concepts of personal autonomy.” *Id.* (quoting *Glucksberg* 521 U.S. at 725).
- ⁴³ *Abigail Alliance*, at 496.
- ⁴⁴ *Id.*
- ⁴⁵ *Cruzan*, at 266.
- ⁴⁶ *Id.* at 268.
- ⁴⁷ The classic tort case regarding informed consent is *Canterbury v. Spence*, 464 F.2d 772 (D.C. 1972).
- ⁴⁸ *Cruzan*, at 274.
- ⁴⁹ 504 U.S. 127 (1992).
- ⁵⁰ *Id.* at 134-35. Yet an overriding state interest might overcome such a right. Nonetheless, a frequently cited case on the right to bodily autonomy is *Schloendorff v. Soc’y of N.Y. Hospital*, 211 N.Y. 125 (1914).
- ⁵¹ *Cruzan*, at 304 (quoting *Moore v. East Cleveland*, at 503 (plurality opinion)).
- ⁵² Other fundamental rights recognized by the Court are the right to be free from intrusion in the “sacred precincts of marital bedrooms,” *Griswold v. Connecticut*, 381 U.S. at 484-86; and the right to determine extended family living arrangements, *Moore v. City of East Cleveland*, 431 U.S. at 503.
- ⁵³ The due process clause guarantees more than fair process, and the “liberty” it protects includes more than the mere absence of physical restraint. *See Collins v. Harker Heights*, 503 U.S. 115, 125 (1992).
- ⁵⁴ *Union Pacific R. Co. v. Botsford*, 141 U.S. 250 (1891).
- ⁵⁵ *Snyder v. Massachusetts*, 291 U.S. 97 (1934).

⁵⁶ *Cruzan*, at 261. *See, e.g.*, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (a due process challenge to a mandatory small pox vaccine). The fact that a state can put limits on individual autonomy and self-determination is key.

⁵⁷ *Abigail Alliance*, 445 F.3d at 474 (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion)).

⁵⁸ *Id.*

⁵⁹ *Reno v. Flores*, 507 U.S. 292 (1993).

⁶⁰ LIMITS OF LIBERTY: STUDIES OF MILL'S *ON LIBERTY* 78 (Peter Radcliff ed., Wadsworth Publishing Co. Inc., 1966).

⁶¹ CHARLES FRIED, MODERN LIBERTY AND THE LIMITS OF GOVERNMENT 51 (2007).

⁶² Competence is not immediately clear however. Just *how* competent a terminally ill individual is in their final days is up for debate. I argue the ability for informed consent might be seriously compromised as well.

⁶³ The Alliance also makes a very weak argument regarding the common law principle of the necessity defense.

⁶⁴ *Glucksberg*, at 745-746. Emphasis added.

⁶⁵ *Id.* at 732. *See also Cruzan*, 497 U.S. at 281.

⁶⁶ *Id.* at 818 (quoting *Youngberg v. Romeo*, 457 U.S. at 321).

⁶⁷ *Id.* at 731.

⁶⁸ One need only to remind themselves of the Jesse Gelsinger research disaster at The University of Pennsylvania. Available at <http://www.sskrplaw.com/links/healthcare2.html>.

⁶⁹ Another resolution for the appellants in *Abigail Alliance*, although admittedly unpopular, would be to attempt access through one of the FDA's compassionate use programs. For the terminally ill in *Glucksberg*, palliative care through hospice is another viable option.

⁷⁰ Codified at 21 U.S.C. §§ 301 *et seq.*

⁷¹ *Abigail Alliance*, 445 F.3d at 499.

⁷² ACCESS Act, S. 1956, 109th Cong. (1st Sess. 2005).

⁷³ *Glucksberg*, at 789.

⁷⁴ *Cruzan*, at 293.

⁷⁵ *Id.*

⁷⁶ FRIED, *supra* note 61 at 51.