FEDERALISM IN THE CONTEXT OF ASSISTED DYING: TIME FOR THE LABORATORY TO EXTEND BEYOND OREGON, TO THE NEIGHBORING STATE OF CALIFORNIA

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I. INTRODUCTION

In a pair of cases decided in 1997 the United States Supreme Court invited state legislatures to address the contentious issue of physician assisted dying.[1] As Chief Justice Rehnquist's opinion for the Court in *Glucksberg* recognized: "Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society."[2]

Similarly, Justice Souter's concurring opinion in *Glucksberg* made explicit his preference for legislative action in this area. In his opinion, "the legislative process is to be preferred", [3] so "the Court should . . . stay its hand to allow reasonable legislative consideration".[4] Likewise, Justice O'Connor's key concurrence demonstrated her belief that state legislatures, rather than the courts, were the preferred forum to address the matter, in the first instance: "States are presently undertaking extensive and serious evaluation of physi-

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1. *See* Washington v. Glucksberg, 521 U.S. 702 (1997); Vacco v. Quill, 521 U.S. 793 (1997).

2. *Glucksberg*, 521 U.S. at 735.

3. *Id.* at 788.

4. *Id*. at 789.

cian-assisted suicide and other related issues. In such circumstances, 'the . . . challenging task of crafting appropriate procedures for safeguarding . . . liberty interests is entrusted to the 'laboratory' of the States.'"[5] The Court adopted a classic approach in these cases by respecting the role of the states in resolving contentious social issues.[6]

California State Representatives Berg and Levine introduced legislation for assisted dying to the California state legislature in 2005.[7] This proposed legislation is similar to the assisted dying law that Oregon passed in 1994 and began implementing in 1997.[8] If enacted, it would empower terminally ill, mentally competent, adult Californians to control the timing and manner of their deaths, subject to careful procedures. A fraction of dying patients, even with excellent pain and symptom management, confront a dying process so prolonged and marked by such extreme suffering and deterioration that they determine that hastening impending death is the least worst alternative.

This paper argues that passage of this law in California would harm no one, would benefit the relatively few patients in extremis who would make use of it, and benefit a great many more terminally ill Californians who would draw comfort from knowing this option is available should their dying process become intolerable to them. Further, by expanding the laboratory of the states, California would do a service to the rest of the nation, as other states watch another state enact and implement such a law. California should step forward as the next state to enact such legislation for two compelling reasons.

First, seven years of experience with the assisted dying law in the bordering state of Oregon has demonstrated that risks to patients are not realized when a carefully drafted law is in place.[9] In light of the Oregon experience, even staunch opponents of this option recog-

5. *Id.* at 737 (O'Connor, J., concurring) (citation omitted).

6. *See infra* Part IV.

7. A.B. 654, 2005-2006 Gen. Assem., Reg. Sess., (Ca. 2005).

8. OR. REV. STAT. §§ 127.800-127.995 (2001).

9. For a recent comprehensive overview of the Oregon experience, urging that medical associations adopt a position of neutrality on assisted dying laws, see Timothy E. Quill & Christine K. Cassel, *Professional Organizations' Position Statements on Physician-Assisted Suicide: A Case for Studied Neutrality*, 138 ANNALS OF INTERNAL MED., 208, 208-11 (2003), *available at* http://www.dwd.org/documents/aim.pdf (last visited Jun. 26, 2005). *See also* Linda Ganzini et al., *Oregon Physicians' Attitudes About and Experiences With End-of-Life Care Since the Passage of the Oregon Death With Dignity Act*, 285 J. AM. MED. ASS'N. 2363-369 (2001); Melinda A. Lee & Susan W. Tolle, *Oregon's Assisted Suicide Vote: The Silver Lining*, 124 ANNALS OF INTERNAL MED. 267-69 (1996), *available at* http://www.annals.org/cgi/content/full/124/2/267 (last visited Jun. 26, 2005).

nize that continued opposition to such a law can only be based on personal moral or religious grounds.[10] Second, over the past decade, California has established a series of strong, effective policy measures to promote good end-of-life care, including good pain and symptom management, which are having significant impact in improving end-of-life care in California.[11] As a result, dying Californians need not choose to hasten death because of inadequate pain and symptom management.

The proposed California legislation includes safeguards to guarantee that assisted dying is available *only* to mentally competent, terminally ill adults who choose this option voluntarily, and whose decisions are informed and enduring. These safeguards are modeled after Oregon's assisted dying statute.

10. *See* Daniel Lee, *Physician-Assisted Suicide: A Conservative Critique of Intervention*, HASTINGS CTR. REPORT 17-19 (Jan. 2003).

11. For an overview of these many policy measures, see Kathryn L. Tucker, *Promoting Good Pain Management in California*, 22 CALIFORNIA HEALTH LAW, Issue 3, at 4 (Summer 2004), *available at* http://www.compassionindying.org/ktpdf/healthlawnews.pdf (last visited Jun. 26, 2005). *See also infra* Part III.