

# How to Deny a Constitutional Right

REFLECTIONS ON THE ASSISTED-SUICIDE CASES

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THE RESULT WAS ORDAINED as soon as the Supreme Court granted review in the assisted-suicide cases.<sup>1</sup> The cases reminded observers of *Roe v. Wade*. The assisted-suicide cases clearly addressed problems of deep concern to the public, as had the abortion cases. But the constitutional vehicle for expressing that concern was the problematic concept of substantive due process. In 1972 the nation was engaged in an on-going discussion of the right form of regulating the decision to obtain an abortion. A similar discussion was occurring with respect to the assisted-suicide issue in 1997. By 1997, however, many observers questioned whether the Court had been right to intervene in the abortion issue in 1973, at least in the manner it had. Better, they suggested, for the Court to have waited a while to

see the general direction that legislative revisions were taking.<sup>2</sup> It could then have offered a better informed assessment of the proper scope of public regulation of the abortion decision. *Roe*, in short, seemed to many to have been premature. So too with the assisted-suicide cases, it seemed. They seemed even more premature than *Roe*, however. At least in *Roe* the Court had a significant body of lower court decisions dealing with abortion to draw upon. In contrast, the court of appeals decisions the Court decided to review were, for all practical purposes, the only lower court cases seriously addressing the constitutional issues associated with the right to obtain assistance in terminating life.<sup>3</sup>

The Court was bound to reverse the lower court decisions. The more interesting ques-

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<sup>1</sup> *Washington v. Glucksberg*, 117 S.Ct. 2258 (1997); *Vacco v. Quill*, 117 S.Ct. 2293 (1997).

<sup>2</sup> For a representative statement, see Cass Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 31 (1996) ("it is at least reasonable to think ... that *Roe* was a blunder insofar as it resolved so much so quickly").

<sup>3</sup> Under other circumstances, this might suggest that the Court should not have intervened, but

tion was how it was going to do so. Reversing meant denying that people had a constitutional right to assistance in terminating their lives. But the issue of assisted suicide was a matter of such public concern precisely because many people knew of problematic deaths. These were situations where, people thought, a reasonable person might seriously have considered committing suicide but was unable to do so because of the highly medicalized conditions in which end-of-life decisions are made today. A flat-out denial of a constitutional right would have seemed excessive, if it denied serious consideration of the claims made about the existence of a constitutional right under some circumstances.

This made it sensible for the Court to consider what Professor Cass Sunstein has labeled a “minimalist” response to the assisted-suicide cases.<sup>4</sup> Such a response has two characteristics: It resolves the cases presented to the Court with the least possible impact on the on-going social discussion of the issue,<sup>5</sup> and it grants as much as possible to all the contending sides.

This second criterion probably ruled out one otherwise attractive doctrinal resolution of the cases. The primary litigants were doctors who said they had patients desiring assistance in committing suicide. Several patients were also plaintiffs, but their complaints simply described their conditions; they did not claim that their particular circumstances – the degree of pain they were suffering, the imminence of their deaths – defined the class of people to be protected by the constitutional right they were attempting to establish. In this sense the challenges were facial rather than as-

applied. One standard technique of rejecting facial constitutional challenges is to find that a significant number of people could be subjected to the challenged statute without violating their constitutional rights. The fact that *someone’s* right might be violated by applying the statute to him or her does not make the statute unconstitutional on its face. The lower court decisions in the assisted-suicide cases conceded that the statutes at issue adversely affected the rights of only a subset of people near the ends of their lives. That would have been enough to support the conclusion that the statutes were not unconstitutional on their face.

The difficulty with this resolution, from the perspective suggested by minimalism, is that it focuses on only one side of the controversy. To uphold the statutes as not substantially overbroad, the Court would have to identify only the group as to whom it was permissible to deny a right to assistance in committing suicide; it would not have to say anything about those whose rights might be denied by the statutes. Of course, one can imagine a decision rejecting the facial challenge because the bans on assisted suicide had some permissible applications, but saying in passing that the Court’s conclusion did not deny that there were some people whose constitutional rights might be denied were the statute to be applied to their circumstances. But this would have been only an indirect, and unnecessary, concession to those supporting the right to assistance in committing suicide.

The overbreadth argument focuses on the statute. The alternative Chief Justice Rehnquist chose focused on the claimed con-

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should have let lower-court law develop. The decisions it reviewed, however, established the constitutional rules for California and New York, the nation’s two largest states; the sheer numbers of people affected explains the Court’s early action in this area.

<sup>4</sup> See generally Sunstein, *supra* note 2.

<sup>5</sup> For reasons I discuss later, I think this formulation is equivalent to one that describes a minimalist decision as one that appears to leave as wide a range of legislative response open as possible.

stitutional right. The analysis of a claim that substantive due process protected an asserted right depended, he wrote, on "carefully formulating the interest at issue." One might describe the interest at stake broadly, for example, as the right to make autonomous decisions with respect to the termination of one's life. Or one might describe it more narrowly, as "a right to commit suicide which itself includes a right to assistance in doing so," which was the Court's version. The narrower the definition, the more one concedes to those claiming that there is a constitutional right somewhere implicated in the problem, for one carves out of the case all the claims made by those not covered by the narrow definition. This approach does not find that those people actually have a constitutional right, but neither does it reject their claims.

In the event, the Court took a path that gave even more to those claiming a constitutional right. The last footnote in Chief Justice Rehnquist's opinion stated that the decision "does not absolutely foreclose" "a more particularized challenge" to the application of a ban on assistance in committing suicide. And, although the Chief Justice's formulation was rather grudging, five other justices – a majority of the Court – rather clearly stated that, in their view, there were indeed circumstances under which a state law denying the possibility of assistance in committing suicide would violate a person's constitutional rights. Consistent with the idea of minimalism, the opinions of these justices did not spell out what those circumstances were with any precision, but they seem to have something to do with a combination of severe and hard-to-alleviate pain at a point when everyone agreed the person was already near the end of his or her life.

The assisted-suicide cases thus look like a perfect example of constitutional minimalism. They gave both sides in the on-going social discussion of the issue support for their positions without definitively resolving the

controversy, which can now continue in legislative and other forums largely unaffected by the Court's action. As Chief Justice Rehnquist put it, "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."

And yet: The idea of minimalism needs to be questioned, in part on its own terms and in part more generally. The remainder of this article raises a series of questions about the idea of minimalism and its application to the assisted-suicide cases.



It seems reasonably clear that minimalism as such tells us nothing about whether the Court should have reversed or affirmed the lower courts in the cases it had before it. The lower courts invalidated the statutes only insofar as they denied the rights of some people affected by them. A majority of the Court agreed that the statutes might deny some people their rights. It is not even clear that the groups to which the lower courts and the Supreme Court majority directed their concern were more than marginally different. An opinion "carefully formulating" the claimed constitutional right as one held by people in severe and untreatable pain concededly near the ends of their lives might have easily found the states' statutes unconstitutional as violations of that right.

A minimalist decision affirming the lower courts might even have contributed to the ongoing democratic dialogue, not by injecting the Court's authority on one or the other side of the issue, but by assuring that democratic consideration of the issue was not obstructed by inertia or other procedural impediments to public, and particularly legislative, discussion. To draw on a phrase from environmental law,



a minimalist decision invalidating existing laws might have been “action-forcing” or, as Professor Sunstein puts it, “democracy-forcing.” The action it would have forced would be open public discussion of the issue in states where procedural obstacles within the legislative process had impeded the discussion.<sup>6</sup> A minimalist decision of this sort would not, however, have forced any particular outcome except by precluding states from applying whatever new regulations they developed to the class of people whose rights a majority of the justices believed would be violated. But, of course, the minimalist decision upholding the statutes has exactly the same substantive effect without having the action-forcing effect too.

One might think that action-forcing was a particularly good idea in the assisted-suicide context. It seems to be widely acknowledged that physicians provide assistance in committing suicide, and sometimes actively terminate life with or without the dying person’s permission, but in a regime that largely lacks overt public sanction. The practices are *sub rosa*. Invalidating existing laws might have had the effect of generating a more considered set of criteria for providing assistance, and more regularized procedures under which assistance would be provided, all with explicit public support. Invalidation, that is, might have produced not only public dialogue where it might not otherwise have occurred, but public endorsement of regulations that would transform a secret practice into an open one.<sup>7</sup>

The idea that courts ought to decide cases in ways that might promote democratic dialogue is associated with Professor Robert Burt.<sup>8</sup> Burt thinks it particularly undesirable for judicial decisions to award complete and final victory to one side in any constitutional dispute, because that cuts off the possibility of continuing interaction within a democratic framework. It might be thought that minimalist decisions have a distinctive virtue from Burt’s point of view: Minimalist decisions do not give victory to either side precisely because they leave so much open for future consideration.

Both Burt’s core argument, and its invocation in support of minimalism, seem to me problematic. Obviously, any single case results in a victory for one side or the other: The bottom line is “affirmed” or “reversed” or “judgment for the plaintiff” or “judgment for the defendant.” Burt is concerned, however, not with results in particular *cases* but with the impact of decisions on public consideration of *issues*. And here, it seems to me, judicial decisions simply do not, and actually cannot, terminate public discussion. Surely one could not reasonably contend, for example, that the Court’s maximalist decision in *Roe v. Wade* terminated public discussion of the abortion issue.<sup>9</sup> Judicial decisions may have several effects: They may increase the costs of altering the policy the judicial decision puts in place;

<sup>6</sup> The Court might have relied on this idea to distinguish between the New York case, where there had been relatively recent legislative consideration of the issue (although that consideration resulted in an outcome that could fairly be described as avoiding a deliberate endorsement of the policy in place), and the Washington one, where there had not been such consideration.

<sup>7</sup> Guido Calabresi and Philip Bobbitt have suggested, however, that in some domains, involving what they call tragic choices, it may be sensible to have practices that are socially approved *sub rosa* rather than overtly. Guido Calabresi & Philip Bobbitt, TRAGIC CHOICES (1978).

<sup>8</sup> See, e.g., Robert Burt, THE CONSTITUTION IN CONFLICT (1992).

<sup>9</sup> Indeed, I think it can reasonably be argued that *Roe* actually deepened public discussion: Before *Roe*, the argument would go, discussions of abortion policy were largely utilitarian, oriented to the effects

they allocate the costs of the policy the decisions put in place to one or the other side on the issue pending later alteration of that policy through public discussion; and they may give one or the other side a boost because of the particular weight judicial decisions have in our legal, political, and public culture.

None of these effects is insignificant, of course, but only the first raises the fundamental question with which Burt is concerned. The question is this: Is it more costly to get from the policy *Roe* put in place to the one *Casey* put in place than it will be to get from the policy left in place by the assisted-suicide cases to the policy we will have in a decade? The first cost is the cost of a maximalist, constitutional decision; the second is the cost of ordinary political deliberation. I do not doubt that sometimes the costs will differ, but I wonder whether they differ much in areas where public views are both strongly held and strikingly divided, as was the case about abortion and as seems to be the case with policy about decision-making near the end of life.

The observation that judicial intervention allocates costs suggests another problem with the idea that minimalist decisions make sense because they allow public discussion to continue unaffected by judicial intervention. Non-intervention is a form of intervention too, in the sense that it allows the discussion to continue against a background set of laws – regarding doctors' general authority, the way in which medical care is to be financed, and the like – that themselves allocate costs. A

"minimally interventionist" decision means that discussion continues with the costs allocated as they are by this background set of laws, while an "interventionist" one means that it continues with the costs allocated differently. Which of the different cost allocations is justified seems to me a question that can be answered only by addressing the merits of the claims about what the Constitution requires, not by defending the value of minimalist decisions on the ground that they allow discussion to continue.

One might put my concerns about the relation between minimalism and the continuation of public discussion, or between maximalism and its termination, in this way: Was there anything the Supreme Court could have done in the assisted-suicide cases that actually would have ended public discussion of the issue?



These considerations suggest that minimalism is better understood as a criterion for evaluating opinions than as a criterion for guiding decision. Minimalism may be an unsuitable decisional criterion for another reason. If minimalism is to guide decision, the justices must make essentially political judgments. They are to ask themselves, What is the current state of public discussion of the issue, and – if public discussion is on-going – what decision will have the least impact on that discussion?<sup>10</sup> But asking the justices to make political judgments

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of abortion policy on population growth, the impact of unwanted pregnancies on the poor, and similar considerations. After *Roe*, in contrast, the more fundamental issue of the status of the fetus as a person, or – put somewhat differently – the relevance of the fact that fetuses are members of the human species, came to the fore. Because public debate had begun to be transformed before *Roe*, however, I would not place too much weight on the distinctive contribution of *Roe* to the transformation. See sources cited in note 13 *infra*.

<sup>10</sup> See Sunstein, *supra* note 2, at 30 ("Minimalism becomes more attractive if judges are proceeding in the midst of fact or (constitutionally relevant) moral uncertainty and rapidly changing circumstances, if any solution seems likely to be confounded by future cases, or if the need for advanced planning is not insistent.").

of this sort is quite problematic.<sup>11</sup>

As a general matter, the American people do not expect justices to be making political judgments on this level: Judges are to be concerned, people tend to think, with law not politics. Of course on some deep level it may be true, and the American people may believe, that law is connected to politics. But not, I think, on the level of quotidian political calculation that must occur if the concerns that justify minimalist decisions are to guide decision. Sometimes it seems as if minimalism is justified by the belief that political judgments are best left to public discussion conducted through the political branches. To that extent, however, minimalism calls on judges to make precisely those judgments that its premises assert judges should not make.

Even on a narrower understanding of minimalism's premises, minimalism as a decisional criterion might conflict with an expectation that judges' opinions reflect as accurately as possible the considerations the judges took into account in arriving at their conclusions.<sup>12</sup> Consider, for example, whether a judge could work into an opinion acceptable to the public the minimalist defense of affirming the lower courts presented in the preceding section of this article.

Nor should we expect judges to be particularly good at evaluating the state of public discussion and figuring out what intervention will have the least impact on it. And, to the extent that they do attempt such an analysis, it might well lead them to more-than-minimal intervention, and justifiably so. Here it may be

helpful to work out a more elaborate political evaluation of the assisted-suicide question as of 1997. I think it undeniable that the number of occasions on which doctors and their patients' families make unreviewed end-of-life decisions has increased over the past generation. As that number increases, so does the number of unreviewed assisted suicides, and at some point – a point I believe we have already reached – people will understand that the practice is reasonably widespread. That trend might taper off, or it might continue. If we have now reached somewhere rather close to the point we will be at in a decade in a world without judicial intervention, minimal intervention is plainly sensible. But it is sensible only in part because it allows the on-going discussion to continue without judicial intervention. It is sensible as well "on the merits," that is, because the public's sense of where we ought to be is not far from where we are now.

Suppose, in contrast, that the trend toward increasing numbers of unreviewed end-of-life decisions continues. In a decade or so, assisted suicide would then be common and socially validated. If one accepts this scenario, the case for minimalism is problematic, again because of the merits as they will seem to the public in 2007. A minimalist decision made in 1997, seen from 2007, will seem to have been one in which the Court inflicted unnecessary pain for a decade. A 1997 decision strongly affirming a constitutional right to assistance in committing suicide would seem to have been an act of statesmanship for which the Court deserves great credit. And, strikingly, it ought to seem

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<sup>11</sup> I should note that, just as the defense of minimalism revives, and slightly transforms, Alexander Bickel's classic discussion of the passive virtues, Alexander Bickel, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111–98 (1962), so these questions about minimalism revive Gerald Gunther's classic challenge to Bickel, Gerald Gunther, *The Subtle Vices of the Passive Virtues*, 64 COLUM. L. REV. 1 (1964).

<sup>12</sup> For discussions, see David Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987); Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990).

that way to a justice in 1997 who thinks the trend will continue.<sup>13</sup>

A real problem would arise, however, if a more-than-minimalist intervention changed the trend toward more unreviewed end-of-life decisions. Here there may be two scenarios. Drawing on one interpretation of the experience after *Roe*, proponents of minimalism might suggest that a more-than-minimal intervention could produce a backlash, interrupting the trend toward more unreviewed end-of-life decisions or at least generating substantially more public turmoil as the public works its way toward something like the solution the Court imposed. Alternatively, they might suggest that such an intervention could accelerate the trend in a way that pushed to a policy of accepting even greater numbers and, worse, a different kind of unreviewed end-of-life decision than would have occurred had the existing trend continued. This is the fear that a more-than-minimalist intervention might lead us to a state in which involuntary euthanasia was found acceptable, even though a continuation of existing trends unaffected by the courts would have stopped short of that point.

It is not clear to me, however, why more-than-minimal decisions would have these effects. Consider first the fear of accelerating the trend and overshooting the mark. By hypothesis, the decision does not itself endorse involuntary euthanasia, but only endorses the idea that people in severe and untreatable pain already near the ends of their lives have a right to assistance in committing suicide. Perhaps, as Chief Justice Rehnquist's opinion suggests, administering a system in which such people's constitutional rights were acknowledged would lead to some instances of involuntary euthanasia. But, it seems to me, there is no reason to think that such cases would come to

be seen as affirmatively desirable, so that public policy ought to endorse involuntary euthanasia, rather than as unfortunately inevitable undesirable by-products of a public policy allowing assisted suicide. And yet the fear of overshooting the mark is that public policy will come to endorse involuntary euthanasia. That fear would be justified if a more-than-minimalist decision led to a general coarsening of public values: Seeing ordinary cases of assisted suicide, people would become less troubled by cases of involuntary euthanasia. At this point, however, it becomes obvious that the defense of minimalism depends on clearly contestable judgments about the hypothesized social effects of judicial decisions, and seems to me quite clearly to make it extraordinarily difficult to rely on minimalism as an evaluative criterion.

The alternative scenario has two branches. In one, the more-than-minimalist decision generates a backlash that eventually means that there are fewer cases of assisted suicide than would occur if the courts had acted minimally. Why, however, is this a problem? Presumably, because the backlash means that advocates of the right to assisted suicide end up getting less than they desire. The minimalist decision, then, is a paternalist intervention on behalf of the right to assisted suicide: The minimalist judge's defense of his or her action is that the minimalist decision is actually better for advocates of the right to assisted suicide than the policy they are actually advocating. This may be entirely correct, but again it seems in some tension with the suggestion that minimalism means that judges act so as to minimize their impact on on-going public discussion. This defense of minimalism offers it as a strategic judgment about what course is more likely to result in a particular public policy, not as an effort to let the public end up

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<sup>13</sup> Cf. Sunstein, *supra* note 2, at 30 ("the argument for a broad and deep solution becomes stronger if diverse judges have considerable confidence in the merits of that solution").



with whatever policy it thinks best.

In the second branch of the alternative scenario, the actual public policy that results from a more-than-minimal intervention is roughly the same as the one that would have resulted from a continuation of existing trends without judicial intervention, but the policy is reached with less turmoil. Here my questions go to the asserted lessons of the experience with abortion. One hypothesis, of course, is that *Roe* itself contributed significantly to the intensity of the public debate over abortion policy, in which case those who hope for judicial decisions that produce intense public discussion ought to be pleased. The alternative hypothesis is that the substantive changes in abortion policy – not their source but their content – generated the intensity. On the latter hypothesis, there would have been just as much public turmoil as the trend toward less restrictive abortion laws found expression in legislation. The best accounts of abortion policy seem to me to support the alternative hypothesis rather than the one that attributes special significance to the Court's intervention.<sup>14</sup>

Recall that we are considering whether the reasons offered in defense of minimalism ought to guide decision. My point in developing these alternative scenarios is ultimately a simple one: The defense of minimalism as a guide to decision asks judges to make the sorts of political assessments that are embedded in the scenarios, and it is quite unclear to me that the American people really want, or should want, judges to engage in political calculation on this level.

This too suggests why minimalism is better understood as an evaluative criterion rather than a decisional one. But even here problems arise. I can introduce them by returning to the suggestion that minimalism could not in itself tell a judge whether to write an opinion reversing or affirming the lower courts in the assisted-suicide cases. Perhaps it is not really possible to write a minimalist opinion invalidating the existing laws. Such an opinion would have to identify the class of people who really do have a constitutional right to obtain assistance in committing suicide. The most minimal opinion, then, would tell legislatures that whatever regulations they devise must guarantee that people in that class be able to obtain assistance. Even saying that existing regulations paint with too broad a brush would direct legislatures to identify *some* class that it intends to protect. But, of course, identifying the class, and identifying the particular people who fall in the class, is going to be quite difficult. Legislatures are likely to respond to this minimalist opinion by developing procedures for identifying those people, submitting their claims for assistance to scrutiny by medical panels, and the like. And the courts will then have to assess every new procedure to determine whether it actually does protect the rights of the relevant class. Or, perhaps more dismaying, it may turn out that the public is actually so divided on the issue that, while most people agree that *some* regulation of end-of-life decision-making is appropriate, a legis-

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<sup>14</sup> David Garrow, *LIBERTY & SEXUALITY* (1994); Archon Fung, *Making Rights Real: Roe's Impact on Abortion Access*, 21 POL. & SOC'Y 465 (1993). The only qualification to this argument is that opposition to *Roe* may have been intensified by the fact that it made available to opponents of its policy the argument that abortion policy should be arrived at by democratic deliberation rather than judicial fiat. Again, the best analysis of which I am aware suggests that this point, if true, has a particular political setting: Pro-choice Republicans could grumble about the anti-democratic nature of *Roe* in a way that allowed them to maintain their political alliance with right-to-life Republicans, while taking comfort in the fact that their pro-choice preferences would be protected by the courts. Mark Graber, *The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35 (1993).

lature would be unable to agree on *what* regulation to adopt.<sup>15</sup> An apparently minimalist decision, that is, might turn out to be rather maximalist.

This difficulty, however, is not associated with minimalist invalidation of statutes. It illustrates a more general problem with the idea of minimalism itself. The argument I have just made is that, under certain political circumstances, a minimalist invalidation might turn out to be a maximal one. But all the other variants are possible as well: A minimalist upholding might turn out to be a maximal one; a maximalist invalidation might turn out to be a minimal one; and so on. The reason is that minimalism is not an intrinsic criterion of decisions or opinions; it is, rather, a way in which the legal culture comes to understand what the decision means. That in turn becomes apparent only as time passes, and is, as my argument suggests, strongly affected by the political and social environment in which the original opinion comes to fit. Here too, then, the argument for minimalism inevitably draws political and social evaluation into play.

The techniques for converting minimalist decisions into maximalist ones, and maximalist ones into minimalist ones, are familiar. The apparently minimalist decision, for example, is taken as a particular application of a broader principle. So, for example, *Griswold v. Connecticut* at first seemed to rely on a narrow principle

regarding "privacy surrounding the marital relationship."<sup>16</sup> Within a few years, the principle of privacy, if it was to "mean anything," had to protect "the individual, married or single, ... from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>17</sup> The step from there to *Roe* was then a small one. Converting an apparently maximalist decision into a minimalist one is similarly easy. Everything beyond the decision's "central holding" is treated as dictum unnecessary to support the judgment actually reached.<sup>18</sup> Or the maximalist rules can be treated as a default position, in place only until legislatures respond to the Court's invalidation of their existing practices.<sup>19</sup>

It might seem difficult to convert the minimalist opinion in the assisted-suicide cases into a maximalist holding, because the Court simultaneously found a narrow constitutional right and denied that there was a broader one. How can this expand into a broader holding? One would of course emphasize the fact that a majority of justices appeared to endorse the position that some class of people did indeed have a constitutionally protected right to assistance in committing suicide. One might then begin to flesh out – and thereby expand – the contours of that class, which was, as I have noted, not well-defined in the opinions. Expansion would be justified on the ground that

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<sup>15</sup> The situation after the Canadian Supreme Court's decision on abortion suggests the problem. The court invalidated the existing law, which made performing an abortion a criminal offense, on the ground that the statute set out a defense that was not, in practical terms, available to doctors who actually performed abortions. Creating an illusory defense, the court held, violated fundamental procedural norms. When the abortion issue then came before Canada's parliament, the legislature was unable to devise a new statute that might survive the court's scrutiny, largely because the public was divided on the question, not expressly addressed by the court's decision, of how much regulation of abortion was appropriate.

<sup>16</sup> 381 U.S. 479, 486 (1965).

<sup>17</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

<sup>18</sup> I draw the phrase "central holding" from the opinion of Justices O'Connor, Kennedy, and Souter in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

<sup>19</sup> This is what the Court said it was doing in *Miranda v. Arizona*, 384 U.S. 436 (1966). It is an important part of my analysis that later courts did not in fact treat the holding in *Miranda* in this way.

the majority's recognition that some people had constitutional rights rested on a more general principle, clearly applicable to a broader class than the one the majority of the justices had in mind. Finally, one might take advantage of the fact that the Chief Justice's opinion seems to make the contemporary state of the law important in evaluating the existence, or defining the scope, of the claimed constitutional right. If the trend toward more private unreviewed end-of-life decisions continues, within a few years there will be enough statutes on the books to make plausible the argument that contemporary public views support the broader right implied by the views expressed by a majority of the justices in the assisted-suicide cases.

This last argument becomes available only if something happens outside the courts. But, in a sense, that is precisely the point. The process by which apparently minimalist decisions become maximal ones or remain minimalist, and by which apparently maximal decisions become minimal or remain maximal, depends crucially on what is happening in the polity more generally. An opinion that looks minimalist today can become the foundation for a maximalist decision later if there is sufficient social support for the transformation – and so too with a decision that looks maximal today. We can know what a decision rendered in 1997 “really means” only by seeing what it is taken to mean in succeeding years.

Other decisions handed down at the end of the 1996-97 Supreme Court Term make the point. Consider *Printz v. United States*, the decision holding unconstitutional a provision in the Brady gun control act because it impermissibly commandeered state executive officials into administering a federal program of checking the records of those who seek to buy handguns.<sup>20</sup> This could be a minimalist decision: The Court's opinion emphasized how unique

and almost unprecedented the federal requirement was, and cited a decision that clearly described alternative routes by which Congress could accomplish its goal. In particular, the precedent relied on seems to say that Congress can make compliance with the invalidated requirement a condition for the receipt of federal law enforcement assistance funds. But *Printz* could be a maximalist decision as well: Much in the opinion supports the revival of a strong notion of dual sovereignty, and could readily be relied on to generate a robust theory of general intergovernmental immunities. Such a theory might, for example, deny that Congress can purchase compliance by attaching conditions to the receipt of federal funds unless the conditions are very closely tied to the purposes for which the funds are to be used: General law enforcement funds might not be closely enough linked to identifying purchasers of handguns to be a permissible condition.

How might the minimalist or maximalist understandings of *Printz* come about? Imagine that Democrats take control of the House of Representatives in the 1998 elections, and a Democratic president is elected in 2000. The odds are then that *Printz* will become a minimalist decision – or that a judicial effort to make it a maximal one will provoke a confrontation between the courts and the political branches reminiscent of the one that occurred in the New Deal period, a confrontation that might be resolved at least in part by simple changes in the Court's composition. But if Republicans retain of Congress, and a Republican president is elected in 2000, *Printz* might easily become a maximal decision, leading the Court to invalidate long-standing laws enacted during the period of Democratic control of Congress.

I have given a basically political account of the way in which *Printz* could become either

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<sup>20</sup> 117 S.Ct. 2365 (1997).

maximal or minimal, because of the political nature of the issue of federalism. But the analysis need not be confined to crude party politics. What matters is the degree of social support for the possible interpretations. In the assisted-suicide context, narrow party politics will matter much less than more general cul-

tural trends.

The bottom line, then, must be this: There can be no bottom line. The story about the constitutional law of assisted suicide, and the jurisprudential issues associated with that law, will simply play itself out over the next decade. 