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# **A Dissent from the Many Dissents from Attorney General Ashcroft's Interpretation of the Controlled Substances Act**

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**Abstract:** In this essay, Professor Marc Spindelman examines the states' rights arguments that have been deployed in the *Oregon v. Ashcroft* litigation to challenge Attorney General John Ashcroft's interpretation of the federal Controlled Substances Act. Professor Spindelman criticizes those arguments as reflecting bad politics—politics of complicity—that self-styled liberals should resist and reject.

On November 6, 2001, U.S. Attorney General John Ashcroft issued an order that was published a few days later in the pages of the *Federal Register*.<sup>1</sup> Relying heavily on a Memorandum that he received from the Department of Justice's Office of Legal Counsel,<sup>2</sup> Ashcroft announced that he had:

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<sup>1</sup> Memorandum from U.S. Attorney John Ashcroft to DEA Administrator Asa Hutchinson, 66 Fed. Reg. 56,607 (Nov. 9, 2001), *reprinted at* 17 ISSUES IN LAW & MED. 265 (2002) [hereinafter, Ashcroft order].

<sup>2</sup> Memorandum from Office of Legal Counsel, U.S. Department of Justice to John Ashcroft, Attorney General of the United States, Whether Physician-Assisted Suicide Serves a "Legitimate Medical Purpose" Under The Drug Enforcement Administration's Regulations Implementing the Controlled Substances Act, June 27, 2001, *printed at* 17 ISSUES IN LAW & MED. 269 (2002) [hereinafter, OLC Memorandum].

determined that assisting suicide is not a “legitimate medical purpose” within the meaning of 21 CFR 1306.04 (2001), and that prescribing, dispensing, or administering federally controlled substances to assist suicide violates the Controlled Substances Act.<sup>3</sup> Such conduct by a physician registered to dispense controlled substances may “render his registration . . . inconsistent with the public interest” and therefore subject to possible suspension or revocation under 21 U.S.C. 824(a)(4) [of the Controlled Substances Act].

As Ashcroft’s order went on to explain, his conclusion:

applies regardless of whether state law authorizes or permits [assisted suicide] by practitioners or others and regardless of the condition of the person whose suicide is assisted. The Attorney General recognizes, however, that pain management is a legitimate medical purpose justifying a physician’s dispensing of controlled substances. Finally, the Attorney General’s determination makes no change in the current standards and practices of the DEA in any State other than Oregon.<sup>4</sup>

The ink of the Ashcroft order had scarcely dried when defenders of Oregon’s permissive assisted suicide law, its “Death With Dignity Act,”<sup>5</sup> made an appearance in federal court,<sup>6</sup> arguing that the order was beyond Ashcroft’s authority.<sup>7</sup> (So swift was the reaction to the Ashcroft order that, if defenders of Oregon’s law didn’t claim they had been sandbagged by it,<sup>8</sup> I would have thought that they had almost been checking their watches, waiting for the order to burst onto the scene.) Among the arrows they shot at the Attorney General’s interpretation of the Controlled Substances Act was the claim, variously made, that it was a violation of states’ rights. But more—much more—about this later on.

Meanwhile, a steady drumbeat from opinion leaders, aligned against Ashcroft’s order, began to be heard—in the newspapers, on the radio, and of course, on the

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<sup>3</sup> 21 U.S.C. §§ 801-904 (1994 & Supp. 2001).

<sup>4</sup> Ashcroft order, *supra* note 1, 66 Fed. Reg. at 56,608.

<sup>5</sup> OR. REV. STAT. §§127.800-.897 (2001).

<sup>6</sup> Oregon v. Ashcroft, 192 F. Supp. 2d 1077, 1084 (D. Or. 2002) (Nov. 7, 2002).

<sup>7</sup> Some of the materials filed in the district in the case are available on the Compassion in Dying website, at <http://www.compassionindying.org>.

<sup>8</sup> Brief of Amicus Curiae Autonomy Inc., *et al.*, in Support of Plaintiffs-Appellees, at 11, Ashcroft v. Oregon, No. 02-35587 (9th Cir., 2003) (“Instead, by reversing his predecessor’s standing directive without formal notice or opportunity to comment, the Attorney General ignored the basic precept ‘that the public interest is served by a careful and open review of the proposed administrative rules and regulations.’”) (footnote omitted) [hereinafter, Autonomy Brief]. See also Oregon v. Ashcroft, 192 F. Supp. 2d., at 1078 (noting that Ashcroft interpretation of the Controlled Substances Act was issued “with no advance warning to Oregon’s representatives”); *id.* at 1083 (discussing promises to Oregon officials made on Ashcroft’s behalf to include them in the review process); *id.* at 1086 (“the Attorney General essentially kept his own counsel, [and] did not provide notice or an opportunity for comment” before issuing his order).

<sup>9</sup> See, e.g., Editorial, *An Assisted-Suicide Verdict*, N.Y. TIMES, Apr. 19, 2002, at A26; Editorial, *Leave Oregon Alone*, WASH. POST, Apr. 20, 2002, at A18.

internet.<sup>9</sup> But the academic commentary didn't lag far behind the *commentarazzi*. *The New England Journal of Medicine*<sup>10</sup> and *The Journal of the American Medical Association*,<sup>11</sup> as well as a number of law reviews, began (or slated themselves) to fill pages with complaints about what the Ashcroft order did.<sup>12</sup> It is something of an understatement to observe that Ashcroft's order generated much anger and caused much sorrow.<sup>13</sup>

But, finally, could be heard some big sighs of relief and not a few unironic "thank heavens" when the cavalry arrived. After fairly extensive hearings and paper

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<sup>10</sup> Richard MacDonald, Correspondence, *Attorney General's Intrusion Into Clinical Practice*, 346 NEW ENG. J. MED. 1918 (2002) ("Attorney General John Ashcroft's challenge to the Death with Dignity Act in Oregon is unusual in that one person with a personal ideology that is based on religious beliefs feels justified in forcing all other citizens to comply with his philosophy. This fanaticism is particularly disturbing given that those on whom he is forcing his beliefs suffer from terminal illnesses without hope of improvement."); Lars Noah, Correspondence, *Attorney General's Intrusion into Clinical Practice*, 346 NEW ENG. J. MED. 1918 (2002) ("Lowenstein and Wanzer persuasively criticize Attorney General Ashcroft's attempt to interfere with Oregon's Death with Dignity Act."); Edward Lowenstein & Sidney H. Wanzer, Correspondence, *Attorney General's Intrusion into Clinical Practice*, 346 NEW ENG. J. MED. 1918 (2002) ("The Department of Justice cannot even successfully define what it condemns."); Edward Lowenstein & Sidney H. Wanzer, *The U.S. Attorney General's Intrusion into Clinical Practice*, 346 NEW ENG. J. MED. 447 (2002) ("Ashcroft's meticulous wording fails to conceal the fact that his directive intrudes on the long-established sovereignty of the states with respect to the regulation of medical practice. It is curious that an administration ostensibly committed to protecting states' rights would choose a tactic that directly undermines those rights in order to prevent a practice it considers morally offensive."); *id.* at 448 ("At present, physicians may provide treatment in accordance with state laws, their patients' requests, and their own consciences. It is chilling to contemplate the prospect that the attorney general would have the power to change by edict many aspects of medical practice."); Robert Steinbrook, *Physician-Assisted Suicide in Oregon—An Uncertain Future*, 346 NEW ENG. J. MED. 460, 462 (2002) ("Ashcroft, a former Republican senator . . . , is a conservative and a long-standing opponent of physician-assisted suicide.")

<sup>11</sup> See Paul B. Bascom & Susan W. Tolle, *Responding to Requests for Physician-Assisted Suicide: "These are Uncharted Waters for Both of Us..."*, 228 JAMA 91 (2002), *cf.* Ben A. Rich, *Oregon versus Ashcroft: Pain Relief, Physician-Assisted Suicide, and the Controlled Substances Act*, 3 PAIN MED. 353 (2002).

<sup>12</sup> For articles that have ultimately discussed the district court's opinion in *Oregon v. Ashcroft*, some number of which were assuredly in the works before that opinion was published, *see, e.g.*, Joseph Cordaro, *Who Defers to Whom? The Attorney General Targets Oregon's Death with Dignity Act*, 70 FORDHAM L. REV. 2477 (2002); Lindsay R. Kandra, Comment, *Questioning the Foundation of Attorney General Ashcroft's Attempt to Invalidate Oregon's Death with Dignity Act*, 81 OR. L. REV. 505 (2002); Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367, 372 (2002).

<sup>13</sup> *Cf.* Yale Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966). "Outrage" may come closer aptly to describing what two of Ashcroft's critics eventually deemed a "raw" grab for power. Sylvia Law & Kathryn Tucker, *Right-to-Die Ruling Is No Threat to Roe*, LEGAL TIMES, July 8, 2002, at 37 ("As a senator, Ashcroft sought to persuade his colleagues to amend the federal drug law to allow such prosecutions [for doctors who engage in physician-assisted suicide under Oregon's assisted suicide law]. He was rebuffed. He then sought to persuade the Justice Department to authorize such prosecutions and was again rejected. Now, as attorney general, he seeks to exercise raw power.").

submissions, U.S. District Judge Robert E. Jones struck down the Ashcroft order, telling the Attorney General (and everyone else) in no uncertain terms: I disagree.<sup>14</sup>

It should now be apparent that Ashcroft's gloss of the Controlled Substances Act has already occasioned a good deal of "microscopic analyses and relentless, probing criticism"<sup>15</sup>—analyses and criticism that seem sure to continue for some time. But what have largely remained unaddressed, at least in academic circles, are the quite troubling implications of the district court's rejection of Ashcroft's reading of the Controlled Substances Act.

In highlighting some of these implications, I realize that one might mistake me for an enthusiastic supporter of, or an apologist for, the Attorney General. As my argument should make clear, I am neither.<sup>16</sup> In any event, as University of Michigan Law School Professor Yale Kamisar put it in a different context years ago: "I take it . . . that one may sharply dissent from portions of [Judge Jones' opinion] without warmly endorsing every aspect of [Ashcroft's order itself]. I take it that here, as elsewhere, one may spot the bad without committing himself to, or knowing, the perfectly good."<sup>17</sup>

My quarrel with the district court's opinion in *Oregon v. Ashcroft* is, on one level, pretty direct. To the extent that that decision relied on a states' rights principle in rejecting the Attorney General's interpretation of the Controlled Substances Act, it was flawed. But my contention really navigates a deeper stream than that. I do not simply venture that the district court in *Oregon v. Ashcroft* misplaced reliance on a principle of states' rights to the degree it did, but also that liberal proponents of those arguments have, in making them, courted unnecessary danger for a range of liberal causes.

To trace my theme, I begin with a brief, introductory discussion of the district court's *Oregon v. Ashcroft* opinion. I will then join the interpretive debate to which that opinion has, in part, given rise. Having established the basis for reading *Oregon v. Ashcroft* as a states' rights decision, I take up more directly the traditionalist principle of the states' rights arguments that have surfaced both in the district court opinion in *Oregon v. Ashcroft* and in the surrounding litigation. My goal in this part will be to test and assess the possible justifications for the states' rights claims in

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<sup>14</sup> I discuss this opinion in detail in the Introduction and text accompanying notes 30-69, *infra*.

<sup>15</sup> Kamisar, *supra* note 13, at 59.

<sup>16</sup> More to the point, I do not wholeheartedly endorse the Attorney General's decision to interpret the Controlled Substances Act the way he did. I think it has proven to be extremely ill advised. Among other things, it has succeeded in breathing life back into what had become a pretty moribund "right to die" movement. For commentary on this, see Yale Kamisar, *The Rise and Fall of the "Right" to Assisted Suicide*, in *THE CASE AGAINST ASSISTED SUICIDE: FOR THE RIGHT TO END-OF-LIFE CARE* 69 (Kathleen Foley & Herbert Hendin eds., 2002) [hereinafter, Kamisar, *The Rise and Fall of Assisted Suicide*]. Nor, while I'm at it, do I concur unreservedly in the Office of Legal Counsel opinion that provides the justification for the Ashcroft opinion.

<sup>17</sup> Kamisar, *supra* note 13, at 60-61.

play in *Oregon v. Ashcroft* until I arrive at the political argument that, I believe, best underwrites them. Having identified that political argument, I will proceed to criticize it not for being political, but for being bad politics for those of us who view ourselves as liberals—politics of complicity—that we should oppose. If there is any single tendentious claim I want to make in this essay, that is it.

### Introduction

On April 17, 2002, U.S. District Court Judge Robert E. Jones officially rebuffed U.S. Attorney General John Ashcroft's interpretation of the federal Controlled Substances Act.<sup>18</sup> According to the court, nothing in the text or the history of that law indicated that Congress intended to give the Attorney General the authority to set national policy on physician-assisted suicide.<sup>19</sup>

Many people both inside and outside of the academy, including me, have been deeply concerned about Ashcroft's conservative political maneuverings. We haven't forgotten that, during his Senate confirmation hearings, Senator Ashcroft made a pledge to the American public that his ideology wouldn't shape or drive his decisions as the country's top law enforcement official.<sup>20</sup> But it appeared to many who had followed (or heard about) those confirmation hearings that Ashcroft had gone back on his word when he read the Controlled Substances Act creatively as a physician-assisted suicide ban.<sup>21</sup>

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<sup>18</sup> *Oregon v. Ashcroft*, 192 F. Supp. 2d 1077, 1079 (D. Or. 2002).

<sup>19</sup> *Id.* at 1087.

<sup>20</sup> *Nomination of John Ashcroft to be U.S. Attorney General, Hearing of the Senate Judiciary Committee*, Federal News Service, Jan. 17, 2001, at 104. ("Well, the way I answered the question a moment ago is the way I want to answer it again, but I'll answer it in these words: I will be law-oriented, and not results-oriented. I will—that's my pledge as I move towards the attorney general office, and of course I can't make good on—I don't want to be presumptuous—I understand that there is a confirmation process. But I will provide my best advice regarding the law, including the law as expressed by the Supreme Court in *Roe v. Wade*.") (comments of Senator John Ashcroft); *id.* ("I will give them my best judgment of the law. And if the law provides something that is contrary to my ideological belief, I will provide them with that same best judgment of the law.") (comments of Senator John Ashcroft); *id.* ("If [the President] is asking me for legal advice, I will provide him with my best judgment. It will not be results-oriented; it will be law-oriented. And I will also answer the President in private, as he has requested me to do, and I don't want to be less than cooperative.") (Comments of Senator John Ashcroft."). See also Ian Christopher McCaleb, *Ashcroft: "I know the Difference Between Enactment and Enforcement of the Law: Senate Panel Opens Three Days of Confirmation Hearings*, at <http://www.cnn.com/2001/ALLPOLITICS/stories/01/16/ashcroft.hearing> (Jan. 16, 2001). For criticism of the Ashcroft interpretation on these grounds, see Kandra, *supra* note 12, at 507 ("Both of these arguments . . . indicate that Ashcroft has done exactly what he pledged not to do at his confirmation hearing: enforce the law as he sees it.").

<sup>21</sup> *Cf.*, e.g., Evan P. Schultz, *Abusing His Discretion*, LEGAL TIMES, May 27, 2002, at 50.

No surprise, then, that the district court's opinion in *Oregon v. Ashcroft* drew a stirring round of applause.<sup>22</sup> After all, that opinion did more than simply check what it described as the Attorney General's attempt to "stifle an ongoing 'earnest and profound debate' in the various states concerning physician-assisted suicide."<sup>23</sup> Moreover, at various points, the court seemed to go out of its way to scold the Attorney General, delivering him an audible—and resolute—smack on the hand.<sup>24</sup>

But at least some defenders of Oregon's assisted suicide law didn't let it go at that. They saw in the district court's opinion far deeper shades of meaning. The court's decision, they proclaimed, confirmed that it is the responsibility of the states, and not the federal government, to regulate the practice of medicine, including physician-assisted suicide. Letting the public in on its understanding of *Oregon v. Ashcroft*, officials at Compassion in Dying, for example, jubilantly announced that: "Attorney General Ashcroft tried to grab for himself power that rightly belongs to the individual states[.] . . . [But] Judge Robert E. Jones' opinion confirms that the regulation of medical practice is the state's job."<sup>25</sup> In a national public radio debate that took place just a few days after Judge Jones released his opinion in *Oregon v. Ashcroft*, Kathryn Tucker, Director of Legal Affairs for Compassion in Dying and a lawyer representing the "patient-plaintiffs" in the current litigation (who argued before the Supreme Court in *Washington v. Glucksberg*<sup>26</sup>) went a good deal farther. Here is what Tucker said:

[W]hether medications are being used 'inappropriately' is the heart and was the heart of Judge Jones' ruling. And the answer to whether medications are being used appropriately or inappropriately is something that has always been left to the states. And that's what Judge Jones recognized[.]<sup>27</sup>

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<sup>22</sup> See, e.g., Christina E. Manual, *Physician-Assisted Suicide Permits Dignity in Dying Oregon Takes on Attorney General Ashcroft*, 23 J. LEGAL MED. 5673 (2002); Lindsay F. Wiley, *Assisted Suicide: Court Strikes Down Ashcroft Directive*, 30 J. L. MED. & ETHICS 459 (2002).

<sup>23</sup> *Oregon v. Ashcroft*, 192 F. Supp. 2d 1077, 1079 (D. Or. 2002).

<sup>24</sup> As Professor Alan Meisel has described it, the district court opinion in *Oregon v. Ashcroft* was "unusually critical of a high federal official." Alan Meisel, *Thwarting Assisted Suicide Threatens Care*, 8 COMMUNITY ETHICS, available at <http://www.pitt.edu/ep981meisel.html>. See also *Oregon v. Ashcroft*, 1077 F. Supp. 2d at 1093 ("Even though both acts failed in Congress, certain congressional leaders made a good faith effort to get through the administrative door that which they could not get through the congressional door, seeking refuge with the newly-appointed Attorney General whose ideology matched their views, and this is precisely what occurred. The Executive Branch immediately began its efforts to re-write the law and achieve its goal of abolishing assisted suicide anywhere.").

<sup>25</sup> Statement from Compassion in Dying Federation on the *Oregon v. Ashcroft* Decision, Apr. 17, 2002, *Federal Intrusion Halted Oregon's Assisted Suicide Prevails*, available at, [http://www.compassionindying.org/releases/4\\_17\\_02.pdf](http://www.compassionindying.org/releases/4_17_02.pdf).

<sup>26</sup> 521 U.S. 702 (1997).

<sup>27</sup> See Transcript of *The Connection* (WBUR Boston and NPR radio broadcast, Apr. 19, 2002) at 29 (on file with author) (emphasis added). The full text of Tucker's comment reads:

MS. TUCKER: Right. And I think that this phrase that Professor Spindelman just used about whether medications are being used inappropriately is the heart and was the heart

This states' rights understanding of the district court's opinion in *Oregon v. Ashcroft* is hardly beyond doubt.<sup>28</sup> Indeed, it has already provoked—and encountered—some fairly intense resistance (interestingly, among others, from some who are opposed to Ashcroft's interpretation of the Controlled Substances Act).<sup>29</sup> And so, before I place any significant weight on it as an approach to my central theme, I need, at least briefly, to join the interpretive debate that that reading of the district court's decision in *Oregon v. Ashcroft* has spawned.

### Reading and Re-reading *Oregon v. Ashcroft*

What, exactly, is so doubtful about the states' rights reading of the district court's opinion in *Oregon v. Ashcroft*? What's problematic about the idea that the

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of Judge Jones' ruling. And the answer to whether medications are being used appropriately or inappropriately is something that has always been left to the states. And that's what Judge Jones recognized, that the content of what constitutes legitimate medical practice is informed or provided by state medical boards, by state statutes, and by standard of care. That is, the physician community practice that has developed. And that has always been what determines whether or not something is legitimate medical practice. . . . In *Oregon* it has been determined that this particular choice is protected.

*Id.* at 29-30. *Accord* Marcia Coyle, *U.S., Oregon to Renew Suicide Fight*, NAT'L L. J., Aug. 19, 2002, at A1 ("This case has 'huge implications' for two reasons, says Kathryn Tucker[.] . . . 'If the directive were to take effect, there would be additional concern in the physician community that prescribing strong pain medication to dying patients could bring scrutiny and sanctions[.]' . . . 'And, second, this is an unprecedented intrusion into an arena historically left to the states—the regulation of the practice of medicine.'") (quoting Kathryn Tucker) (emphasis added); Naseem Rakha, *Battle Continues Over Oregon's Assisted-Suicide Law*, STATE NET CAPITOL J., Feb. 11, 2002, SNCJ Spotlight ("A group of terminally ill patients, represented by a pro-Death with Dignity Act advocacy group, Compassion in Dying, intervened in the state's lawsuit, contending [that] Ashcroft's action was 'well outside the scope of the law.' Compassion's [Director] of Legal Affairs Kathryn Tucker maintained [that] Congress has no authority to step in and regulate the states' medical practices."); Bill Hewitt et al., *Last Wish*, PEOPLE, Nov. 26, 2001, at 63, 64 ("The federal government," says Kathryn Tucker, legal director for the Compassion in Dying Federation, 'should not be permitted to intervene and control end-of-life decision-making.'). *But see, e.g.,* Law & Tucker, *supra* note 13, at 37 ("The sole basis of the district court ruling is that the federal drug law does not allow prosecution of doctors engaged in the legal and legitimate practice of medicine.") (emphasis added). At the debate sponsored by the Association of the Bar of the City of New York, held on February 26, 2003, Tucker offered the view that the states' rights arguments being made in *Oregon v. Ashcroft* were "tertiary" arguments—a far cry from "the heart" of Judge Jones' opinion, it seems.

<sup>28</sup> Estelle Rogers rejects this reading of *Oregon v. Ashcroft*, insisting that it only was decided on statutory interpretation grounds. Estelle H. Rogers, *A Federalism of Convenience*, HUMAN RIGHTS, Fall 2002, at 15, 17 [hereinafter, Rogers, *A Federalism of Convenience*]. (Rogers originally published at least some of these remarks in the *Legal Times*, in response to a comment on the district court's decision in *Oregon v. Ashcroft* that I wrote. For Rogers' answer, see Estelle Rogers, *Assisted Suicide Ruling Does Not Jeopardize Roe*, LEGAL TIMES, June 10, 2002, at 61. For my original comment, see Marc Spindelman, *Protecting Suicide and Hurting Women*, LEGAL TIMES, May 27, 2002, at 51 [hereinafter, Spindelman, *Protecting Suicide and Hurting Women*]. For reasons I suggest below, however, see *infra* text accompanying note 48-69, I do not think it is as easy as Rogers supposes it is to disentangle statutory interpretation and federalism issues in the case.

<sup>29</sup> See *infra* text accompanying note 45 (discussing Estelle Rogers' views).

district court's *Oregon v. Ashcroft* opinion "confirmed" or had as its "heart" a traditionalist principle of states' rights?

Perhaps the most prominent *textual* reason to resist a states' rights interpretation of *Oregon v. Ashcroft* is that the district court told us that the law it was announcing in the case was made interstitially, as a technical matter of statutory interpretation, confined (in Justice Holmes' famous words) in that range between "molar [and] molecular motion."<sup>30</sup>

Indeed, on no fewer than three occasions in its relatively short opinion did the district court tell us in just so many words that that was all that it did:

As I suggested to the parties during the March hearing, the resolution of this case turns on the [Controlled Substances Act] and *does not require constitutional analysis*.<sup>31</sup>

Although congressional action attempting to control matters traditionally left to the state[s] *may raise constitutional issues for any future legislation in the field*, suffice it to say that *at this juncture*, neither the U.S. Constitution nor the Bill of Rights speaks to assisted suicide, neither providing for it as a personal right nor prohibiting it.<sup>32</sup>

And one more time for good measure, to dispel any lingering confusion about what the court *really* meant:

I *again* emphasize that I resolve this case as a matter of statutory interpretation, and my interpretation of the statutory text and meaning is that the [Controlled Substances Act] does not prohibit practitioners from prescribing and dispensing controlled substances in compliance with a carefully-worded state legislative act.<sup>33</sup>

The district court reaffirmed its intention not to resolve *Oregon v. Ashcroft* in constitutional terms when it gestured toward the possibility that "an express federal law prohibiting"<sup>34</sup> physician-assisted suicide *or* "a specific congressional grant of authority"<sup>35</sup> to the Attorney General to do so, might fall within "constitutional limits."<sup>36</sup> This, according to the district court, even though "such a grant of authority" would be "unprecedented and extraordinary."<sup>37</sup> Having announced that it was is-

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<sup>30</sup> *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). For those who aren't so scientifically inclined, we could "change the figure," PAUL A. FREUND, ON LAW AND JUSTICE 55 (1968), and say instead that the district court told us that it was giving us its opinion at retail, not wholesale. *Id.* at 99 ("Justice Holmes puts his view pithily when he said that judges make law interstitially, that they are confined from molar to molecular motion. Justice Frankfurter puts it more colloquially, saying that judges make law at retail, legislators at wholesale.")

<sup>31</sup> *Oregon v. Ashcroft*, 1077 F. Supp. 2d at 1084 (emphasis added).

<sup>32</sup> *Id.* at 1093 (emphasis added).

<sup>33</sup> *Id.* (emphasis added).

<sup>34</sup> *Id.* at 1084.

<sup>35</sup> *Id.* at 1092.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

suing a “fairly narrow[]”<sup>38</sup> ruling on statutory interpretation grounds, the court informed us that it was leaving a “constitutional analysis”<sup>39</sup> of a “specific prohibitive federal statute”<sup>40</sup> dealing with assisted suicide until another day.<sup>41</sup>

After all this, one might ask, how could anyone suggest that the *Oregon v. Ashcroft* decision “confirms” a *constitutional* principle of states’ rights? To do that, wouldn’t the court ultimately have had to engage in precisely the sort of “constitutional analysis” it emphatically disavowed? To answer the constitutional question it left open?<sup>42</sup>

Many people are, I gather, inclined to think so. Estelle Rogers, Executive Director of the Death with Dignity National Center, an organization that describes itself as “dedicated to expanding end-of-life choices and advancing the legalization of physician aid in dying[,]”<sup>43</sup> apparently is. She helps us to understand why when she remarks that:

Judge Jones’s ruling in *Oregon v. Ashcroft* was on the narrowest possible grounds.<sup>44</sup> In fact, out of all the alternatives offered in the State of Oregon’s pleadings, he rested on the first: that Congress did not intend to grant the attorney general the authority to override a state’s determination as to what constitutes a “legitimate medical practice.” In a very real sense, then, this is a case about statutory construction *and not about federalism at all*. The court found that Congress, when it drafted, debated, and passed the [Controlled Substances Act], intended to regulate drug trafficking—not prohibit assisted suicide. Ashcroft’s attempt to effectuate the latter purpose through an unrelated law by executive fiat would simply not withstand judicial scrutiny.

Having found ample justification for his decision in the plain language and legislative history of the [Controlled Substances Act], Judge Jones went no further. He explicitly refused to revisit the moral, ethical, and religious debate surrounding assisted suicide. Likewise, *he found it unnecessary to plumb the jurisprudential depths of federalism under our constitutional system*. Ironically, at this stage of the litigation, *Oregon v. Ashcroft* may just be a minor case about the “original intent” of the [Controlled Substances Act]. Its future as precedent of any broad applicability is highly questionable.<sup>45</sup>

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<sup>38</sup> *Id.* at 1080.

<sup>39</sup> *Id.* at 1084.

<sup>40</sup> *Id.* at 1092.

<sup>41</sup> For other portions of the opinion that (seem to) leave open the possibility of congressional action in this arena, see *id.* at 1084, 1089, 1092, 1093.

<sup>42</sup> See Kandra, *supra* note 12, at 521 (“Jones did not address issues of . . . constitutional law.”).

<sup>43</sup> Rogers, *A Federalism of Convenience*, *supra* note 28, at 17.

<sup>44</sup> Actually, it wasn’t, as the district court opinion itself made clear. See *Oregon v. Ashcroft*, 192 F. Supp. 2d at 1084-85 & n.9 (“Moreover, while I tend to agree with plaintiff and intervenors that the Ashcroft directive fails to pass muster as a matter of administrative law, I decline to resolve this case on that basis.”).

<sup>45</sup> *Id.* at 16 (emphasis added). Accord Law & Tucker, *supra* note 13, at 37 (“The sole basis of the district court ruling is that the federal drug law does not allow prosecution of doctors engaged in the

Drawing lines can be tricky business; defending them, trickier still.<sup>46</sup> While the sharp distinction that Rogers etches for us—between “the narrowest possible” statutory interpretation ruling, on the one hand, and the broader (and deeper) ruling about “federalism under our constitutional system,”<sup>47</sup> on the other—may sound pleasant, and be reassuring, it is hardly as crisp as Rogers would have us believe.

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No one who had followed the *Oregon v. Ashcroft* litigation as it developed in the district court could have been entirely caught off guard when the district court opinion, in its opening paragraph, announced that it was resolving one skirmish in a much larger “battle between the state of Oregon and the federal government over which government has the ultimate authority to decide what constitutes the legitimate practice of medicine[.]”<sup>48</sup> Both the federal government and defenders of Oregon’s law had litigated the case in these federalist terms.

But it was curious that the district court took up sides with defenders of Oregon’s law in portraying Ashcroft’s order—the “first shot”<sup>49</sup> in this battle over states’ rights—as violating the spirit (if not the letter) of the Supreme Court’s constitutional decision in *Washington v. Glucksberg*.<sup>50</sup> The district court did not, for instance, stop with the comment we encountered earlier, that: “[t]hrough his directive, Ashcroft evidently sought to stifle an ongoing ‘earnest and profound debate’ in the various states concerning physician-assisted suicide.”<sup>51</sup> The district court went on to lend some of its not inconsiderable interpretive authority to the novel proposition, popularized during the *Oregon v. Ashcroft* litigation, that *Glucksberg* affirmed a constitutional principle of states’ rights—and that it did so even as it rejected the claim that the Due Process Clause affords terminally ill individuals a right to physician-assisted suicide. As the district court put it, the *Glucksberg* Court “declined to ‘strike

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legal and legitimate practice of medicine.”); Alexei Oreskovic, *Ashcroft Batted Away from Assisted Suicide*, THE RECORDER, Apr. 18, 2002, at 1 (“[Nicholas] [v]an Aelstyn . . . said he was pleased that the court had ruled on such narrow statutory grounds. ‘He ruled squarely on the CSA,’ said van Alestyn. ‘That makes the ruling, we believe, that much stronger when it goes up on appeal.’”).

<sup>46</sup> See Marc Spindelman, *Reorienting Bowers v. Hardwick*, 79 N.C. L. REV. 359, 397 (2001); see also generally Louis Henkin, *On Drawing Lines*, 82 HARV. L. REV. 63, 63-65 (1968) (discussing the practice and techniques of judicial line drawing); Yale Kamisar, *The “Right to Die:” On Drawing (and Erasing) Lines*, 35 DUQ. L. REV. 481, 489 (1996) (same, in the context of the “right to die”).

<sup>47</sup> Rogers, *A Federalism of Convenience*, supra note 28, at 16.

<sup>48</sup> *Oregon v. Ashcroft*, 192 F. Supp. 2d, at 1078. The opinion then qualified its remark somewhat by adding: “at least when . . . substances regulated under the Controlled Substances Act . . . are involved.” *Id.*

<sup>49</sup> *Id.* at 1078.

<sup>50</sup> 521 U.S. 702 (1997).

<sup>51</sup> *Oregon v. Ashcroft*, 192 F. Supp. 2d at 1079.

down the considered policy choice' of the State of Washington, deferring instead to that state's resolution of the debate."<sup>52</sup>

What made (and makes) the district court's endorsement of a states' rights reading of *Glucksberg* curious isn't so much the oddity of the interpretation itself (though there is that<sup>53</sup>). Rather, it's that the district court elaborated and then endorsed the reading—at all. Why, one wonders, did the district court bother with this? Doesn't its opinion suggest that its resolution of *Oregon v. Ashcroft* turned *only* on an interpretation of the Controlled Substances Act? Didn't the court insist it wasn't engaging in a constitutional analysis of federalism principles? If so, isn't the entire discussion of *Glucksberg* superfluous, a distraction? Come to think of it, the district court's comment that its decision settled a score in the "battle . . . over which government has the ultimate authority to decide what constitutes the legitimate practice of medicine"<sup>54</sup> is curious in a similar way. Why did the district court

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<sup>52</sup> *Id.* (citation omitted). Compare Law, *supra* note 12, at 415 ("The [*Glucksberg*] Court refrained from settling the ongoing debate in the states and provisionally denied recognizing a federal constitutional right out of deference to federalism principles respecting state sovereignty.") (footnote omitted). Highlighting Justice Sandra Day O'Connor's observation in *Glucksberg*, that "the . . . challenging task of crafting appropriate procedures for safeguarding . . . liberty interests is entrusted to the 'laboratory' of the States . . . in the first instance[.]" *id.* (citation and internal quotation marks omitted), the district court went on to comment:

As the Court acknowledged in *Glucksberg*, the citizens of Oregon, through their democratic initiative process, have chosen to resolve the moral, legal, and ethical debate on physician-assisted suicide for themselves by voting—not once, but twice—in favor of the Oregon Act. The Oregon Act attempts to resolve this 'earnest and profound debate' by 'striking the proper balance between the interests of terminally ill, mentally competent individuals who would seek to end their suffering and the State's interest in protecting those who might seek to end life mistakenly or under pressure.'

*Id.* (quoting *Glucksberg*, 521 U.S. at 737 (O'Connor, J., concurring)).

<sup>53</sup> I take up this reading of *Glucksberg*—ultimately to explain why it's flawed—in a separate article. For now, its basic point can be quickly summarized this way: The only question involved in *Glucksberg* was the question whether the Fourteenth Amendment required states to legalize assisted suicide, at least in certain cases. *Glucksberg* thus did not decide the states' rights question; certainly it did not decide that the states and only the states could regulate the practice. Indeed, as Dean Norman Redlich and David Lurie helpfully explained in the wake of the Court's *Glucksberg* decisions:

In this regard, it is also significant that neither side in the recent physician assisted suicide case, *Washington v. Glucksberg*, . . . —in which the Court refused to recognize a proposed new constitutional right-to-die, and left the issue to the states—viewed the result as a triumph of federalism. Rather, all parties to the debate, including the Justices authoring opinions in the case, addressed the soul searching issue presented as one of governmental regulatory authority versus individual rights, not of state versus federal regulatory powers.

Norman Redlich & David R. Lurie, *Federalism: A Surrogate for What Really Matters*, 23 OHIO N.U. L. REV. 1273, 1294 n.68 (1997).

<sup>54</sup> *Oregon v. Ashcroft*, 192 F. Supp. 2d at 1078.

give us this colorful, but entirely beside-the-point description of itself and its place in the ongoing litigation?

The answer is that the district court's introductory observations may not have been so unnecessary, and may have well been worth making, if the court was setting the stage for an interpretation of the Controlled Substances Act that was itself animated by constitutional principles of federalism. If that is what the court was doing, it would be (at least) helpful to know that the Supreme Court was thinking about federalism considerations when it decided *Glucksberg*.<sup>55</sup> For *Glucksberg*, then, would provide the district court with reasons to interpret the Controlled Substances Act with federalism principles in mind. And it would likewise be good to know that *Oregon v. Ashcroft* is but one part of an ongoing struggle over the constitutional distribution of powers between the federal government and the several states. That would provide us with some sense of how to understand the district court decision and the ultimate stakes of the *Oregon v. Ashcroft* litigation.

Of course, if the district court was using its introduction to lay the groundwork for an interpretation of the Controlled Substances Act that was substantively informed by a constitutional principle of federalism, then we would surely find some evidence of that principle in operation when the court analyzed the language and history of the Act. Can we?

Judging by the interpretive canons that the district court opinion expressly invokes in the course of analyzing the Controlled Substances Act, the answer might appear to be "no." Conspicuously absent from the list the district court offers is the so-called "federalism canon," which (as I mean to refer to it) approximately holds that courts should read federal legislation in a way that is consistent with constitutional principles of federalism in the absence of some "specific" or "clear" statement that Congress intended to alter the traditional balance of power between the national government and the states.<sup>56</sup> *Expressio unius*, right?

Well, no. It's one thing to say that the district court didn't expressly invoke the federalism canon, but it's something else again to say that the district court didn't rely on it when interpreting the Controlled Substances Act. And, significantly, throughout its opinion, the district court's analysis of the Controlled Substances Act tracks the federalism canon. The very questions with which the district court approaches the Controlled Substances Act—Does it, for instance, reflect congressional intent to authorize the Attorney General to make a national determina-

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<sup>55</sup> Assuming *arguendo*, of course, that the Supreme Court was thinking about such considerations when deciding *Glucksberg*. See, *supra*, note 53.

<sup>56</sup> For a useful and thoughtful discussion of the federalism canon I have in mind (there are actually many of them), see William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules and Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992). This canon is a variation of the "constitutional avoidance canon": that courts should avoid rendering unnecessary constitutional judgments. See, e.g., *Crowell v. Benson*, 285 U.S. 22, 62 (1932); *Murray v. Schooner Charming Besty*, 6 U.S. (2 Cranch) 64, 118 (1804) (both of these cases are cited in Eskridge & Frickey, *supra*, at 599 n.7).

tion of what is or is not a legitimate medical practice or purpose?<sup>57</sup>—are the questions the federalism canon recommend. Why? Recalling the canon’s general advice—read congressional legislation as affirming traditional distributions of power between the federal government and the states—it may be enough to repeat the district court’s observation that “[t]he determination of what constitutes a legitimate medical practice or purpose traditionally has been left to the individual states.”<sup>58</sup> Since Congress did not indicate its intention to disrupt this traditional balance of power—through, for example, a “specific congressional grant of authority”<sup>59</sup> or a “specific prohibitive federal statute”<sup>60</sup> as part of the Controlled Substances Act—the Act should not be read to have done so. This, at least, is what the district court opinion can be read to suggest.

One can stitch various parts of the district court’s *Oregon v. Ashcroft* opinion together, as I just have, in order to explain how it can be regarded as the product of the federalism canon. But the district court did give us some direct evidence that this is how we should understand its opinion in the course of analyzing the Controlled Substances Act. As the district court draws its discussion of the legislative history of the Act to a close, it comments: “Moreover, no legislative history supports [Ashcroft’s] theory that Congress intended the 1984 amendments to ‘alter[] the federal-state framework by permitting federal encroachment upon a traditional state power.’” To state the point flatly: This is the federalism canon at work.

And no wonder. The language that the district court quotes so approvingly comes from the Supreme Court’s decision in *Solid Waste Agency v. Army Corps of Engineers*,<sup>61</sup> one of the Court’s recent and prominent federalism canon decisions. The full paragraph from which the language is lifted sheds light on how the district court’s *Oregon v. Ashcroft* opinion approached its analysis of both the text and the history of the Controlled Substances Act:

Where an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power. *See United States v. Bass*, 404 U.S. 336, 349, 30 L. Ed. 2d 488, 92 S. Ct. 515 (1971) (‘Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance’). Thus, ‘where an otherwise acceptable construction of a statute would raise serious constitutional prob-

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<sup>57</sup> *Oregon v. Ashcroft*, 192 F. Supp. 2d at 1087.

<sup>58</sup> *Id.* at 1092.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> 531 U.S. 159 (2001).

lems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.<sup>62</sup>

The district court's invocation of—and reliance on—*Solid Waste* raises a number of questions that the court, by its own admission, does not attempt to answer. To mention but a few: Did Ashcroft's interpretation of the Controlled Substances Act press "the outer limits of Congress' power"? If so, why? (The novelty of federal regulation of physician-assisted suicide is no good answer,<sup>63</sup> unless novelty itself should define the outer limits of Congress' power.) If Ashcroft's interpretation does not press those limits, what is the district court's justification for relying on a principle of states' rights to guide its own interpretation of the Controlled Substances Act? Was the district court, in the name of statutory interpretation, suggesting that the states should prevail in the battle between them and the federal government, of which *Oregon v. Ashcroft* is a part? Was the court engaging in a form of constitutional or "quasi-constitutional" activism without having to face or own up to it—by vindicating without analysis, hence without public justification, a constitutional principle of states' rights?<sup>64</sup>

I give voice to these questions because they should be considered as the conversation about *Oregon v. Ashcroft* continues, not because I presently plan to address them. They open up vistas far more complex than any I currently need to survey. The simple point I wish to make here, borne out by what I've already said, is that the district court interpreted the Controlled Substances Act in conformity with the federalism canon. Accordingly, even though the district court may have chosen to wrap its opinion in the "thin" paper of statutory interpretation, it would be a mistake for us to confuse the wrapping paper for what appears to be inside (or underneath) it: The federalism canon and its assumption about the appropriate constitutional allocation of authority between the federal government and the states. (I'll be taking a close look at this assumption in a moment.)

Rogers, among others, has effectively recognized that there's more to the district court's opinion in *Oregon v. Ashcroft* than its wrapping paper alone. Despite her formalistic and crabbed insistence that the district court in *Oregon v. Ashcroft* issued a narrow ruling on statutory interpretation grounds, and that the court's opinion

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<sup>62</sup> *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001).

<sup>63</sup> See, e.g., *Oregon v. Ashcroft*, 192 F. Supp. 2d at 1092 ("To allow an attorney general—an appointed executive whose tenure depends entirely on whatever administration occupies the White House—to determine the legitimacy of a particular medical practice without a specific congressional grant of such authority would be unprecedented and extraordinary."). But as Justice Roberts wrote on behalf of the Court as long ago as 1935: "Our duty . . . is fairly to construe the powers of Congress, and to ascertain whether or not the enactment falls within them, uninfluenced by predilection for or against the policy disclosed in the legislation. *The fact that the compulsory scheme is novel is, of course, no evidence of unconstitutionality.*" *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330, 336 (1935) (emphasis added).

<sup>64</sup> See Eskridge & Frickey, *supra* note 56, at 598.

didn't "plumb the jurisprudential depths of federalism under our constitutional system[.]"<sup>65</sup> she has recognized that the court nevertheless "defer[red] to state regulation of the medical profession."<sup>66</sup>

I agree. Indeed, I would say more. Notwithstanding the district court's exorbitant protestations, a states' rights reading of its *Oregon v. Ashcroft* opinion captures an important aspect of its textual attitude. Any reading of the opinion that doesn't recognize that the district court's interpretation of the Controlled Substances Act is bound up with constitutional principles of federalism will have a difficult—if not an impossible—time explaining a number of signal moments in the text. I am thus not at all certain that it is really playing either too fast or too loose with the text of the district court's *Oregon v. Ashcroft* opinion to maintain as Compassion in Dying officials did, that it "confirms" that medical regulation is the states'—and not the federal government's—job.<sup>67</sup> Nor, I think, is it much of an overstatement—perhaps it is really no overstatement at all—to say as Kathryn Tucker has, that states' rights "is the heart and was the heart of [the district court's] ruling."<sup>68</sup>

As always, there may yet be room within the district court's opinion in *Oregon v. Ashcroft* for a response. But, for present purposes, I am content to leave off here. For my goal is not to try to dramatize (or agonize over) the textual arguments—be they many or few—for thinking that a constitutional principle of states' rights did not animate the district court's opinion in *Oregon v. Ashcroft*. Rather, what I want to do is to examine what follows if it did.

Taking that as the starting point of the remainder of my discussion, I want to explain why the district court's opinion in *Oregon v. Ashcroft*, and the states' rights arguments defenders of Oregon's assisted suicide law have been making in the litigation, sets off alarms that those of us who think of ourselves as liberals should hear—and heed. Although New York University Law Professor Sylvia Law's concerns are aimed in somewhat different directions, she elegantly expresses the idea I have in mind where she writes that: "these new federalism developments should be of urgent concern, not as a matter of seemingly arcane doctrine, but as a subject of importance to ordinary public-minded citizens."<sup>69</sup> In the next part, I begin to explain why.

### Tradition

Claims about states' rights are woven deeply into the fabric of the *Oregon v. Ashcroft* litigation. Ideas about what rights the states as states have are part of the challenge to the procedural regularity with which Ashcroft issued his interpretation

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<sup>65</sup> Rogers, *A Federalism of Convenience*, *supra* note 28, at 16.

<sup>66</sup> *Id.*

<sup>67</sup> See *supra* note 25.

<sup>68</sup> See *supra* note 27.

<sup>69</sup> Law, *supra* note 12, at 372. For Professor Law's views on the role that states' rights should play in the assisted suicide debate, see *id.* at 412-17.

of the Controlled Substances Act.<sup>70</sup> They are also (in ways we have already indirectly seen) among the reasons given to explain why Ashcroft's reading of the Controlled Substances Act is inconsistent with ordinary principles of statutory interpretation.<sup>71</sup> Nor is that all. Defenders of Oregon's assisted suicide law, along with their friends, have relied on principles of states' rights in the litigation to make various, free-floating constitutional claims.<sup>72</sup>

No matter how it is dressed up, though, the states' rights arguments in *Oregon v. Ashcroft* tend to cohere around a single principle. As the State of Oregon has framed it, enthusiastically quoting the district court: "The determination of what constitutes a legitimate medical practice or purpose traditionally has been left to the individual states."<sup>73</sup>

This principle is the fountainhead of an argument that, as I understand it, proceeds something like this. The authority to regulate the practice of medicine, including the power to define what the practice of medicine is, has traditionally been left to the states. That tradition defines the authority that the states continue to have in this arena. Thus, it is within the scope of the authority of the states to determine whether physician-assisted suicide is (or is not) a "medical practice." This is not a matter for the federal government to decide. *Q.E.D.*

This is a big pill to swallow. Still, I might have been prepared to hold my nose and force it down if its sole defect were its stunning oversimplification of how medical practice in our country is actually regulated. Stated broadly, the view that

<sup>70</sup> See Plaintiff's Memorandum in Support of Summary Judgment, at 44, *Oregon v. Ashcroft*, 192 F Supp. 2d 1077 (D. Or. 2002) ("Experimentalism at the state level is thus the preferred method for arriving at national policy regarding contested social issues when, as here, no national consensus has emerged; or where the matter, as here, is one traditionally left to the states."); *id.* at 12 (dealing with the Attorney General's failure to consult with officials from the State of Oregon, and explaining that the "Ashcroft Directive is invalid because the Attorney General failed to comply with the APA's notice and comment requirements for substantive rules").

<sup>71</sup> *Id.* at 42-43 ("[Federalism] dictates that certain topics, including regulation of the medical profession and end-of-life decisions, shall be left exclusively to the states."); Appellee's Brief of the State of Oregon, at 54-55, *Ashcroft v. Oregon*, No. 02-35587 (9th Cir., 2003) ("The deference issue cannot be addressed without acknowledging the federalism concerns in this case. As explained above, because Ashcroft's directive effectively upsets the delicate balance between federal regulation of trafficking in controlled substances and historical state regulation of medical practice, it is invalid absent a clear statement of Congress's intent to grant him that authority."); *id.* at 22-26 (discussing states' rights principles in the context of the "clear statement" rule of statutory interpretation).

<sup>72</sup> Among them: a Tenth Amendment argument, as well as several "commerce clause" arguments. See, e.g., Plaintiff's Memorandum in Support of Summary Judgment, *supra* note 70, at 36 ("The Directive violates fundamental principles of federalism embodied in the Tenth Amendment."); *id.* at 41 ("[T]here is nothing in the legislative history of the Controlled Substances Act regarding any supposed relationship between a dying patient's use of controlled substances and interstate commerce.").

<sup>73</sup> Appellee's Brief of the State of Oregon, *supra* note 71, at 19-20 (internal quotations omitted) (citing excerpts of the record, at 66). See also, e.g., Law, *supra* note 12, at 416-17 ("[T]he regulation of the practice of medicine . . . has traditionally been the province of the states rather than the federal government.").

the states have traditionally regulated medical practice, with its implication that the federal government has not, is wrong. All the same, I am prepared to countenance (and to live with) a little hyperbole in legal debates. So much, I think, may be expected within an adversarial system like ours, even though “in judgment a dilemma is not solved by tooting only one side of the two horns.”<sup>74</sup>

But there’s something else—something more significant—that keeps me from swallowing the states’ rights pill. The argument that traditional state authority over medical practice defines what that authority should presently be, is strikingly incomplete. There are many ways this is so. But one that has received practically no attention so far is that proponents of the states’ rights arguments in the *Oregon v. Ashcroft* litigation have failed to provide us with any principled justification for the level of generality at which they describe the states’ “right” at issue in the case.<sup>75</sup> One searches in vain, for instance, for any explanation about why the states’ authority to regulate physician-assisted suicide should be treated as a subset of the states’ “right” to regulate the practice of medicine. All the same, we might like to know, why it should be treated *that* way, and not, say, as a function of the states’ (even more general) “right” to protect the health and welfare of their citizens,<sup>76</sup> or the states’ “right” to exercise their sovereign police powers? Could it be that defenders of states’ rights in *Oregon v. Ashcroft* have no principled justification for the level of generality at which they’re defining the states’ right they claim exists?

Questions breed questions. Had the proponents of states’ rights in *Oregon v. Ashcroft* provided us with a principled justification for the view that state authority over medical practice is the relevant tradition we should consider, we might still wonder: Why, when we do consider it, should we conclude that *because of, and as part of, that tradition* the states have a “right” enforceable against the federal government to regulate physician-assisted suicide any way they like? The answer, at least for the proponents of the states’ rights arguments in *Oregon v. Ashcroft*, appears to be that: (1) the states have traditionally had the authority to govern medical practice, and (2) that traditional authority includes the right to define medical practice; *there-*

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<sup>74</sup> Thomas Reed Powell, *Judicial Protection of Civil Rights*, 79 IOWA L. REV. 383 (1944).

<sup>75</sup> Compare Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (plurality opinion of Scalia, J.) (“We do not understand why . . . Justice Brennan would choose to focus instead upon ‘parenthood.’ Why should the relevant category not be even more general—perhaps ‘family relationships’; or ‘personal relationships’; or even ‘emotional attachments in general?’”). Cf. Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990). This point holds true whether one addresses states’ rights at the level of statutory interpretation or constitutional review.

<sup>76</sup> Actually, this argument has been made, again without justification for the choice of the level of generality at which the states’ right has been described. See, e.g., Brief of Amicus Curiae Margaret P. Battin, *et al.*, in Support of Plaintiff-Appellees for Affirmance, at 25, *Oregon v. Ashcroft*, No. 02-35587 (9th Cir., 2003) (“Regulation of medical decision-making falls within traditional state authority over matters relating to public health, health care, and health policy.”) [hereinafter, Bioethicists’ Brief].

fore, (3) that states should have a “right” to determine whether physician-assisted suicide is a medical practice. I get everything but the “therefore.”<sup>77</sup>

Fortunately, some of those who adhere to this view have filled out its unstated logic. They have told us that they believe physician-assisted suicide can be—or is—a form of (legitimate) medical practice. As one of the briefs explains to the Ninth Circuit:

Medicine is a morally committed enterprise that is legitimately governed by its own internal norms. However, the morality of medicine always has evolved and continues to evolve in the face of social change. As two influential defenders of the ends-of-medicine theory rightly observe: “Even the core of medical morality must be thoughtfully reevaluated and reconstructed at intervals, and the reconstruction will be carried out by those who live in modern society who are inevitably influenced by societal values as they interpret the history.” These writers explicitly note that even if it were correct that medical tradition consistently condemned physician-assisted dying (as it has not) “today’s physicians might still [legitimately] conclude that so many things have changed since the time of Hippocrates . . . to warrant a reconstruction of the internal morality so that assisted suicide in certain defined circumstances is permissible.”

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Convictions about the scope of patient rights, both among Americans generally and among medical professionals and writers in medical ethics, remain sharply divided. Many believe that the ability to choose a humane hastened death constitutes a fundamental personal liberty and provides, for some, a means of avoiding unnecessary suffering and preserving dignity in their last days. Others, like the Attorney General, find it wrong. Clearly, however: . . . there are legitimate policy grounds for enacting a statute such as Oregon’s; . . . and there is increasing support among medical professionals and writers in medical ethics for allowing the terminally ill to secure the assistance of a willing physician in hastening death.<sup>78</sup>

I don’t wish to pick nits I don’t really have to pick. So, for purposes of discussion, let me just allow that a state’s decision to legalize physician-assisted suicide (at least under some limited circumstances) may be justified. Accordingly, if *Oregon v. Ashcroft* turned on whether Oregon could provide a reasoned justification for its law permitting physician-assisted suicide under limited circumstances, Oregon might properly win.

But that is not what *Oregon v. Ashcroft* is about. Whatever else one might say about it, *Oregon v. Ashcroft* is not a (judicial) referendum on the changes in present-day thinking about legitimate medical practice that the right to die movement has wrought. As many defenders of Oregon’s law have described it, *Oregon v. Ashcroft* turns, on its most basic level, on the tradition of states’ rights. On that level, the

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<sup>77</sup> Charles Fried reports that Thomas Reed Powell properly gets credit for this expression.

<sup>78</sup> Bioethicists’ Brief, *supra* note 76, at 12-14 (citations omitted).

challenge to the Attorney General's interpretation of the Controlled Substances Act founders: It fails to consider and seriously to engage what the tradition of traditional state authority over medical practice has—or, more precisely, *has not*—been.<sup>79</sup> What might the challenge have noticed—and responded to—if it had?

Because the debate occasioned by *Oregon v. Ashcroft* has persistently been framed as a debate about comparative governmental authority to legislate the practice of *physician-assisted* suicide, it is easy to forget: The states that have traditionally regulated physician-assisted suicide have not promulgated laws that address *this* practice and *this practice alone*. Rather, states have traditionally handled the practice of physician-assisted suicide as part of their more general treatment of the practice of *assisted suicide*—conduct that, in general terms, states have dealt with using the tools they have at their disposal to define, to police, and to superintend, substantive *criminal law*.<sup>80</sup>

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<sup>79</sup> This idea, or one very much like it, I think, led the authors of the Office of Legal Counsel Memorandum—the legal opinion that Ashcroft relied on to justify his interpretation of the Controlled Substances Act—to observe that:

[T]he activity of assisting in suicide should not, in our view, be considered a 'medical' practice solely because it is undertaken by a physician: as we have shown, physician-assisted suicide has been condemned by the overwhelming majority of the States and by the leading professional associations of medical and nursing practitioners. On the theory of the Oregon Deputy Attorney General's Letter[—that 'the practice of medicine . . . is . . . an area traditionally reserved to the States'—]an act that was performed by doctors, despite being forbidden by ordinary professional standards or even punishable elsewhere as a crime, could be transformed into a 'medical' practice if a single State were to decide to deem it so; and that State's unilateral decision would presumptively place the act beyond the reach of Federal regulation. It would follow that if a State authorized physicians to perform involuntary euthanasia on severely handicapped or mentally retarded persons, and thus 'medicalized' that procedure, it could be beyond Federal regulatory power[.]

OLC Memorandum, *supra* note 2, at 21.

<sup>80</sup> There are, no doubt, historical explanations, both intensely interesting and complicated, that one could offer to account for state regulation of assisted suicide as a matter of criminal law. But I don't think they need to delay us too much here. Still, I do think it worth pausing long enough to note, and to explain, this: If one considers existing criminal laws about assisted suicide, including their longstanding historical roots, with a traditionalist eye, it may be possible to get some handle on why states did not traditionally mold the law of assisted suicide in the clay provided by state authority to make medical practice law.

One could begin with the observation that it would have been little short of nonsensical to the traditional thinker to maintain that assisted suicide was a "medical practice," much less a legitimate one. The *amicus* brief signed by, among others, the former Surgeon General C. Everett Koop, and filed with the Ninth Circuit in *Oregon v. Ashcroft*, nicely limns the traditional view:

By virtue of a centuries-old practice and ethic, the medical profession, while committed to diagnosing illness, curing patients, preventing disease, and relieving pain, is deeply opposed to killing patients. Physician-assisted suicide has '[l]ong been viewed as outside the realm of legitimate health care....' This ethical prohibition against assisting

It may be worth mentioning in this connection that the Supreme Court did not fail to notice this traditional feature of assisted suicide laws when it heard and decided the “assisted suicide cases,” *Washington v. Glucksberg*<sup>81</sup> and *Vacco v. Quill*,<sup>82</sup> half a dozen years ago. Speaking for the *Glucksberg* Court, Chief Justice William Rehnquist explained that: “[i]n almost every State—indeed, in almost every western democracy—it is a *crime* to assist a suicide.”<sup>83</sup> In the words of Justice David Souter, speaking officially only for himself:

While suicide itself has generally not been considered a punishable crime in the United States . . . most States have consistently punished the act of assisting a suicide as either a *common-law or statutory crime* and some continue to view sui-

suicide is ‘a cornerstone of medical ethics,’ with roots ‘as ancient as the Hippocratic oath.’

Brief *Amici Curiae* of C. Everett Koop, *et al.*, at 3-4, *Ashcroft v. Oregon*, No. 02-35587 (9th Cir., 2003).

To think about something the way people traditionally thought about it can be difficult. “History is slippery,” as Professor Martha Nussbaum has recently (and rightly) observed. MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* 10 (draft on file with author). The same might be said of tradition-based reasoning, too. An analogy may thus prove helpful in illustrating how weird it once might have seemed even to propose that the practice of assisted suicide should be handled through state authority to police medical practice law. Imagine, then, that someone today were to propose that we ought to address acts of torture of suspected terrorists through state authority to police the practice of medicine. Wouldn’t we say: How bizarre! Or ask: Why would I do that? We might even respond to the suggestion by exercising “one of the sovereign prerogatives of philosophers—that of laughter.” Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421, 424 (1960).

But why? To many of us, I think, it will seem like a (kind of) category mistake to suppose that the law of torture should (or could) be made through medical practice rules. This is not because the clever mind cannot see the medical dimensions of torture (the history of torture amply establishes the connection), but because handling the practice through medical practice rules would be to use state authority over medical practice to oversee a species of conduct that has nothing whatever to do with modern cultural understandings of medicine. If so, might we not have reason to suspect that, once upon a tradition, local officials might have responded to the notion that assisted suicide should be regulated via state authority over medical practice with incredulity? Once one appeals to state authority over the practice of medicine when regulating assisted suicide, doesn’t it become that much more difficult than it once was, to insist that the practice is entirely “outside of the realm of legitimate health care”? Doesn’t regulating assisted suicide through state authority over medical practice effectively concede that the practice is somehow adjacent to, if not part of, “the realm of legitimate health care”? Put us one step closer to saying that it is medically appropriate? It is telling—of, perhaps, just how successful the “right to die” campaign has been, how far it has moved us away from our old traditions—that even the remaining traditionalists among us (I’m not one myself) have now been forced to argue that assisted suicide can be regulated through federal oversight of what doctors “as doctors” do. As part of this, unlike those whose traditionalist views they share, present-day traditionalists are now faced with the task of having to justify what, traditionally, was self-evident, what didn’t even call for justification. As we are in the process of learning, this is not always an easy thing to do.

<sup>81</sup> 521 U.S. 702 (1997).

<sup>82</sup> 521 U.S. 793 (1997).

<sup>83</sup> 521 U.S. 702, 710 (1997) (footnote omitted). See also *id.* n.8 (citing authorities).

cide as a punishable *crime*. *Criminal prohibitions* on such assistance remain widespread....<sup>84</sup>

It is as true in *Oregon v. Ashcroft* as anywhere else that, as Justice Felix Frankfurter once observed, “on the question you ask depends the answer you get.”<sup>85</sup> But the answer you get can also depend on the question you *don’t* ask. And so, if it has seemed natural, to some, to conclude that respect for the states’ exclusive authority to regulate the practice of medicine gives states a “right” to determine what the law of physician-assisted suicide should be, it is, in no small part, because proponents of the states’ rights claims in *Oregon v. Ashcroft* have avoided even a cursory inquiry like the one I’ve just offered—an inquiry that their own analysis recommends—into the traditional basis for state regulation of physician-assisted suicide.<sup>86</sup>

Let me make the basic point I wish to make in a slightly different way. One can maintain that there is a tradition of state (criminal law) regulation of assisted suicide, including physician-assisted suicide. And one can (at least in some sense) likewise maintain that there is a tradition of state regulation of medical practice. But from this it simply does not follow that those two traditions traditionally intersected in the particular way they would have to, to authorize proponents of the states’ rights arguments in *Oregon v. Ashcroft* to maintain that the states’ traditional authority to regulate the practice of medicine has been exercised to regulate the practice of assisted suicide, including physician-assisted suicide.<sup>87</sup> Quite simply, it has not. There is no tradition—certainly no longstanding tradition—of (please note the formulation) state regulation of the practice of medicine that itself includes regulation of assisted suicide.<sup>88</sup>

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<sup>84</sup> *Washington v. Glucksberg*, 521 U.S. 702, 774-75 (1997) (Souter, J., concurring) (citations and footnotes omitted) (emphasis added).

<sup>85</sup> *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 484 (1948) (Frankfurter, J., dissenting). See also, Henry Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in *BENCHMARKS* 318-19 (1967).

<sup>86</sup> I myself do not and typically would not think about state authority in the kind of categorical terms that proponents of the states’ rights arguments in *Oregon v. Ashcroft* propose. It strikes me as odd to treat state authority over medical practice as a discrete sphere of state power that is separate and separable from others, say (to use one relevant example, see *infra* text accompanying notes 89-94), the state power to make and enforce criminal laws. Indeed, in light of the kind of formalism that proponents of assisted suicide have elsewhere consistently eschewed, it is ironic that they would take precisely such an approach when making the states’ rights claims they do.

<sup>87</sup> Oregon’s permissive assisted suicide law may be the first occasion in which the two traditions intersected one another.

<sup>88</sup> The reasons one might wish to say this are outlined by none other than Justice Scalia himself, in an opinion joined by Chief Justice Rehnquist: “Because such general traditions provide such imprecise guidance, they permit judges to dictate rather than discern the society’s views. . . . Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best when the unanticipated occurs, a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all.” *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (plurality opinion of Scalia, J.). To put the point more directly, if the “level of generality” analysis found in Justice Scalia’s *Michael H.* opinion is a disciplining force, it could (and perhaps should) apply to judicial construction of tradition-based states rights, as well.

Without some argument dealing with this pesky historical fact, I fail to see how one can properly credit the claim that states' have a "right" to control the practice of medicine, which itself includes the "right" to regulate physician-assisted suicide—free from federal interference. Indeed, without such an argument, I think one might fairly conclude contrariwise: There is no tradition of traditional respect for the states' "right" to regulate physician-assisted suicide as a function of their authority over medical practice, much less a "right" to do so free from federal interference.

Having come this far, I have to go a little farther still. In candor, I feel obligated to acknowledge the corner I may be seen to have boxed myself into: In the course of highlighting the deficiencies of the standard states' rights argument that has been made in the *Oregon v. Ashcroft* litigation, I have recognized that states have traditionally regulated assisted suicide under the auspices of the criminal law.

Given this,<sup>89</sup> I can already hear the (giddy) reply: Building on what might have seemed a throw-away line in an article by Professor Sylvia Law, defenders of Oregon's assisted suicide law might insist that what I have given up is already all that's needed to make out a valid—though different—states' rights claim. For, as Law has written: "[T]he determination whether, when, and how [assisted] suicide should be subject to criminal sanctions is a traditional subject for state regulation[.]"<sup>90</sup> and that tradition, or so one might say, is (or should be) enough to stop the Attorney General from "usurping"<sup>91</sup> the authority of the states to have the final say about what the law of assisted suicide should be, "whether, when, and how[.]"<sup>92</sup>

This argument is not just a little more powerful than the states' rights claim flowing from the states' traditional authority to call the metes and bounds of medical practice. It is, I believe, more powerful *by far*. Not least of all, it is a good deal more accurate in its description of how states have actually, as a matter of historical fact, exercised their authority to prohibit assisted suicide. And its potential persuasive force doesn't end there. It's susceptible of joining a parade of horrors that conservative supporters of states rights have already lined up and marched out as a means of insisting on the importance of limiting "federal powers . . . in areas [such as the criminal law] where states have traditionally been sovereign,"<sup>93</sup> a project that they have undertaken in order to reverse "the High Court's previously longstanding trend toward turning Congress's enumerated power[s] . . . into a generalized police power."<sup>94</sup>

This is not, of course, to say that a states' rights claim based on traditional state authority over the criminal law should prevail. It shouldn't. At the end of the

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<sup>89</sup> For an important qualification, see *supra* note 86.

<sup>90</sup> Law, *supra* note 12, at 417.

<sup>91</sup> See, e.g., Bioethicists' Brief, *supra* note 76, at 27; Autonomy Brief, *supra* note 8, at 11.

<sup>92</sup> Law, *supra* note 12, at 417.

<sup>93</sup> *United States v. McHenry*, 97 F.3d 125 (6th Cir., 1996) (Batchelder, J., dissenting).

<sup>94</sup> *United States v. Chesney*, 86 F.3d 564 (6th Cir., 1996) (Batchelder, J., concurring).

day, that claim ought to be rejected for the same reason as its medical practice cousin should. Both of these pills are contaminated by the same emetic: A principle of tradition constitutes the substance of their basic normative claims.

For one who thinks (as I do) that states' rights arguments which rely on a principle of tradition are little more than a variation of the naturalistic fallacy that Hume identified long ago (simply put, that one cannot derive "ought" from "is"), the states' rights arguments being made in *Oregon v. Ashcroft* call out for this reply every time they are made: *So what* if the regulation of assisted suicide—whether as a function of the states' authority over medical practice or to define the substantive criminal law—"has traditionally been the province of the states rather than the federal government[?]"<sup>95</sup> Stated bluntly: Why should tradition, rather than a rule of reason, matter that much—at least to liberals?<sup>96</sup> Surely liberal defenders of Oregon's law couldn't seriously mean to argue that the "rights" of states should be defined by tradition alone.<sup>97</sup>

Or could they?

Providing some useful instruction in this regard is the so-called "Bioethicists Brief" filed in *Oregon v. Ashcroft*—a brief signed by no fewer than forty-two of our country's leading liberal thinkers about the law and ethics of the "right to die." Many of the Brief's *amici* are, predictably, proponents of physician-assisted suicide. But, as the Brief itself trumpets with a loud air of pride, a small but significant number of those who signed it are longstanding *opponents* of legalized assisted suicide.<sup>98</sup>

Reading the Bioethicists' Brief thus presents us with certain interpretive challenges. How many of the Brief's arguments, we might ask, and which ones, can

<sup>95</sup> Law, *supra* note 12, at 416-17.

<sup>96</sup> I am, of course, well aware of the rhetorical power of traditionalist narratives. And I am likewise aware of the regularity with which we liberals have deployed them in support of liberal legal causes. Indeed, tradition is so much an integral part of our legal culture, so much a part of how we think about law, that it is difficult to imagine disposing of the legal tradition of tradition altogether. I am thus not asking that we do. As will become clearer later on, *see infra* text accompanying notes 124-165, what I am saying is something else again: Self-styled liberals should be aware of the dangers to liberal projects following from complicity with conservatives' tradition-based states' rights project. For an especially thoughtful analysis along the lines I have in mind, *see* David Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035 (1991), and especially *id.* at 1035-42, 1056-57.

<sup>97</sup> An issue that has been little discussed, so far, in the *Oregon v. Ashcroft* litigation is whether, even assuming that the states do have rights grounded in a principle of tradition, courts should busy themselves enforcing them. *See, e.g.,* JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 171-259 (1980); Jesse H. Choper, *Federalism and Judicial Review: An Update*, 21 HASTINGS CONST. L.Q. 577 (1994); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). These concerns are no less applicable when a principle of states' rights is being advanced through statutory interpretation. *See, e.g.,* Eskridge & Frickey, *supra* note 56, at 598, 629-646.

<sup>98</sup> Bioethicists' Brief, *supra* note 76, at 26-27.

properly be attributed to individual *amici*?<sup>99</sup> With what authority do bioethicists as bioethicists speak to how authority should be divided in our federal system, including the definition or scope of states' rights?<sup>100</sup> However interesting these challenges may be (or are), I don't think we need to settle them here. For our purposes, what matters is not what individual *amici* have to say about the states' authority to regulate medical practice, or with what precise authority they do (or would) speak about it, but what the Bioethicists' Brief itself actually says. And on that front, with one notable wrinkle that I press to the margins,<sup>101</sup> the Brief is pretty straightforward.

According to the Bioethicists' Brief: "Regulation of medical decision-making falls within traditional state authority over matters relating to public health, health care and health policy."<sup>102</sup> Relying on an interpretation of the Supreme Court's decision in *Washington v. Glucksberg*—an interpretation that, like the district court's in *Oregon v. Ashcroft*,<sup>103</sup> commits the "error [of] lift[ing] sentences or even paragraphs out of one context and insert[ing] the abstract thought into a wholly different context"<sup>104</sup>—the Bioethicists' Brief insists that *Glucksberg* reflects "a tradition of state regulation of health care and state jurisdiction over public health policy generally."<sup>105</sup> Just a few pages later, the Brief declares that Attorney General Ashcroft's

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<sup>99</sup> But the Bioethicists' Brief itself gives us a hint where it says: "Some amici signing this Brief oppose physician-assisted suicide, but join because they object to the Attorney General's usurpation of authority over the states' legitimate law-making powers," *Id.* One could, I take it, reasonably read this language as a general endorsement of the states' rights arguments found throughout the Brief (more about which in a moment). But I myself am inclined to understand it instead as reflecting the view that Attorney General John Ashcroft's decision to exercise his authority to interpret the Controlled Substances Act to prohibit physician-assisted suicide was a poor tactical move—one that has breathed life back into a right-to-die movement that had been reeling from the loss it suffered in *Glucksberg* and *Quill*. See Kamisar, *The Rise and Fall of Assisted Suicide*, *supra* note 16. In this sense, I think that at least some of the *amici* on the Brief would agree with Justice Antonin Scalia who, in a speech at the Northwestern School of Law of Lewis and Clark College, proposed to the citizens of Oregon: "You want the right to die. The Constitution [says] nothing about it." And: "That's right and that's fine. You don't hear me complaining about it." Shelby Oppel & Paige Parker, *Scalia Sticks with the Original in Constitutional Controversy*, PORTLAND OREGONIAN, Feb. 11, 2002, at B1.

<sup>100</sup> Andrew W. Siegel, Bioethicists and the Supreme Court: *Amici* or *Inimici* (draft on file with author).

<sup>101</sup> As mentioned earlier, the Bioethicists' Brief goes out of its way to criticize the traditionalist opposition to physician-assisted suicide. See *supra* text accompanying note 78. In doing so, the Brief occupies the traditional liberal position on the relevance of tradition to legal argument. What the Brief does not do, however, is reconcile that position with the one that I am going to go on to discuss in the text: The Brief's own traditionalist argument in favor of states' rights. If one reads that argument literally, the Brief's different positions on the concept of tradition appear to be inconsistent, in need of clarification. But ultimately, as I go on to explain, see *infra* text accompanying notes 111-113, though I think one *could* read Brief's traditionalist-seeming defense of states' rights literally, I do not.

<sup>102</sup> Bioethicists' Brief, *supra* note 76, at 25.

<sup>103</sup> See *supra* notes 50-56 and accompanying text.

<sup>104</sup> *Compassion in Dying v. Washington*, 49 F.3d 586, 590 (9th Cir. 1995).

<sup>105</sup> Bioethicists' Brief, *supra* note 76, at 26.

reading of the Controlled Substances Act “impermissibly asserts federal control over matters for which the states should, *and always* have, exercised jurisdiction.”<sup>106</sup>

I’m not. But were I inclined to read the Bioethicists’ Brief with “the literalness of a country parson interpreting the first Chapter of Genesis,”<sup>107</sup> I might very well be primed to conclude that it—like other liberal briefs in the case—*really is serious* in its advocacy of the view that states as states have the exclusive authority to regulate the practice of medicine, including physician-assisted suicide, because tradition determines what state authority over medical practice is.

Just so, there would be an equally serious reply to give. As one proponent of physician-assisted suicide who signed the Bioethicists’ Brief, Professor Sylvia Law, has put it—delivering what, at least until recently, was tantamount to a liberal article of faith: “Tradition is not its own justification.”<sup>108</sup> Of course, anyone who disagreed would not only have Professor Law to contend with, but Justice Oliver Wendell Holmes, as well. As Holmes famously commented over a hundred years ago:

It is revolting to have no better reason for a rule of law than so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.<sup>109</sup>

Silence can be telling. Guiding us away from too literal a reading of the states’ rights arguments being made in *Oregon v. Ashcroft* is what none of its proponents have said: That tradition, contrary to popular liberal belief, really *does* provide its own justification. Nowhere have I seen it flatly said in exactly these words: A principle of tradition, standing entirely by itself, properly establishes that the states and not the federal government have the final authority to set the law of physician-assisted suicide.

But how can we choose to read the states’ rights arguments if we don’t choose to read them literally? How else, *if not purely out of respect for a principle of tradition*, might we understand the states’ rights opposition that has been mounted to bring down Ashcroft’s interpretation of the Controlled Substances Act? From a number of sources, we have an important clue, found on more conventional—and, I think, more normatively defensible—liberal grounds. It is to that argument—grounded in what might loosely be called a “rule of law” principle—to which I now turn.

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<sup>106</sup> *Id.* at 29 (emphasis added).

<sup>107</sup> This nifty turn of phrase originally comes from ALBERT R. BEISEL, JR., CONTROL OVER ILLEGAL ENFORCEMENT OF THE CRIMINAL LAW: ROLE OF THE SUPREME COURT 32 (1955), cited in Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?)*, the Burger Court (*Is It Really So Prosecution Oriented?*), and Police Investigatory Practices, in THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN’T 62, 64 (Vincent Blasi ed., 1983).

<sup>108</sup> Sylvia Law, *Families and Federalism*, 4 WASH. U. J. L. & POL. 176 (2000).

<sup>109</sup> Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

### The Arguments Reconsidered: Authority and the Rule of Law

If a literal reading of the states' rights arguments being made in *Oregon v. Ashcroft* sees their normative ground as being nothing more than a pure (or radical) principle of tradition, a rule of law reading of them opens up the possibility that that principle itself rests on deeper grounds: a normative commitment to the rule of law. We might thus think that what liberal proponents of the states' rights arguments being offered in *Oregon v. Ashcroft* really mean to say is this: We believe that the tradition of state regulation of medical practice should be respected within *Oregon v. Ashcroft* not because of tradition as such, standing alone, but because the Supreme Court has taught us that tradition controls where states' rights are concerned. We respect this conclusion, including the tradition of states' rights, because we respect, and are bound by, the rule of law.

But there may be more to the argument than that. According to Professor Law:

The practicing lawyer has broad latitude, and indeed a responsibility, to use whatever argument works for his or her client. Lawyers are required to "represent [a] client zealously within the bounds of the law." Where legal rules are ambiguous, lawyers routinely argue one position or the opposite, depending on which view serves the clients' interests. . . . Indeed, if a lawyer perceives that a client might be helped by a legal argument that the lawyer is unable to make for reasons of his or her personal conscience, the lawyer's obligation is to help the client find another advocate.<sup>110</sup>

The strong version of this account, I take it, is that lawyers representing clients who are challenging Ashcroft's interpretation of the Controlled Substances Act (or at least some of them) are *obligated* to raise a states' rights challenge to it, whether they themselves—as good liberals—believe in states' rights *or not*—if doing so will "serve the clients' interests." And given that existing Supreme Court precedents can be read to treat "tradition [as] . . . its own justification," what these lawyers think about that subject likewise matters not at all, only the judgment call that this will really help protect Oregon's physician-assisted suicide law, does. Indeed, in light of the Supreme Court's recent states' rights rulings, so the strong version of the idea would seem to go, it would be a violation of rules of professional ethics not to raise a states' rights shield against Ashcroft's interpretation of federal law. Such an argument *could* work, after all. Moreover, as suggested before, there's reason to think that it *has already worked* in *Oregon v. Ashcroft*.

Now, there are many things that the rule of law affirmatively requires. But I have never heard it said that it either does or should command a mode of selfish unthinking among its adherents. The rule of law does not bind either an advocate uncritically to embrace, or a court uncritically to extend, unsettled doctrine. Much

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<sup>110</sup> Law, *supra* note 12, at 422 (notes omitted).

less when that doctrine, as the Supreme Court's current doctrine of states' rights does, raises serious and broad-based concerns about the limits of the federal courts' "mystic"<sup>111</sup> function.

In any event, at least when it comes to the states' rights arguments being made in *Oregon v. Ashcroft*, I cannot see how a commitment to the rule of law requires either that those arguments be made by advocates or accepted by courts. Justice John Paul Stevens, speaking for himself and Justices Souter, Ginsburg and Breyer, has strongly urged players in the lower courts (or at least the umpires) to resist lending their support to the Supreme Court's new doctrines of states' rights.<sup>112</sup> As he writes: "[T]he kind of judicial activism manifested [in recent Supreme Court federalism decisions] . . . reflects such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises."<sup>113</sup>

I could go on.<sup>114</sup> But enough has already been said to explain why, in general terms, I find myself in agreement with Professor Law, that "even for practicing lawyers, this broad principle—that one should deploy every argument that might help in any particular case—may be too simplistic."<sup>115</sup>

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<sup>111</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 29-33 (1962) (discussing the "mystic function" of the Supreme Court).

<sup>112</sup> Proponents of states' rights in *Oregon v. Ashcroft* often rely heavily on a "states' rights" interpretation of the Supreme Court's decision in *Washington v. Glucksberg*. See, e.g., Sylvia Law, *supra* note 12, at 415. The Bioethicists' Brief, for instance, seems to place a good deal of weight on an exchange during oral arguments before the Supreme Court in *Glucksberg* (and its companion case, *Vacco v. Quill*, 521 U.S. 793 (1997)), in which it was conceded for purposes of argument that the states were constitutionally free to legalize or criminalize the practice of physician-assisted suicide. Bioethicists' Brief, *supra* note 76, at 26. As I understand it, the concession at oral arguments before the Supreme Court, that the states could choose how to handle the practice of physician-assisted suicide, is not inconsistent with my reading of *Glucksberg*. States can have the authority to do something without having an exclusive right to do so, which would preempt federal intervention into the field. See also *supra* note 53.

<sup>113</sup> *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 98-99 (2000) (Stevens, J., dissenting).

<sup>114</sup> What I have said about the reasons why advocates do not *have* to make states' rights arguments and why judges do not *have* to accept them only skims the surface. What ethical obligations do those who are not directly party to the *Oregon v. Ashcroft* litigation, but who have joined it as *amici*, have to stake out a states' rights position? What are the ethics of interpretation that do (or should) guide our readings of the Supreme Court's states' rights (or, for that matter, assisted suicide) cases? One need not subscribe to the radical version of the "indeterminacy thesis" advanced by some scholars (once) associated with the "critical legal studies" movement, see, e.g., MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES*, 17-25 (1987); see also, e.g., John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument*, 45 *DUKE L.J.* 84 (1995), in order to believe that the legal, including (or especially) the constitutional, sources of judgment that the states' rights debate *Oregon v. Ashcroft* involves are not so determinate that the case *must be* decided in Oregon's favor.

<sup>115</sup> Law, *supra* note 12, at 422.

Does this mean that we should reject the rule of law reading of the states' rights arguments being made in *Oregon v. Ashcroft*? I'm inclined to think not. Just because one version of it may be—or is—"too simplistic" doesn't mean that it will be in its every form.

What, though, might a savvier articulation of the rule of law interpretation of the states' rights arguments be? What would the explanation for the states' rights arguments look like were it made with a keener *nous*?

One could make the point in any number of ways, all with a slightly different inflection. But here, pieced together from various sources I have encountered (some published, some not), is how one paraphrased version of the argument justifying a rule of law interpretation of the states' rights arguments being advanced in *Oregon v. Ashcroft* goes:

We liberals are stuck. We're committed to working within the system, above all. We have to work with the tools that are part of the game. But right now, unfortunately, we are not crafting those tools. They—the conservatives—are. If we were in power, sure, we wouldn't need to be making a states' rights argument to protect Oregon's assisted suicide law. If we ran the show, we would have won in *Washington v. Glucksberg*; we'd already have a national rule that a right to 'physician-assisted death' is the law of the land. We would have Oregon and all the rest of the states. But we aren't, and don't.

What we have, though, are the tools that the Supreme Court has given us. And those include the tools of states' rights. Now, don't get me wrong. I don't think that conservatives on the Court really believe in states' rights; I think that it is their way of covering how activist they are in advancing their substantive political goals. Ashcroft's interpretation of the Controlled Substances Act proves this. But we'll never be able to show the general public how utterly empty conservative legal politics are at their core, if we don't use their tools against them, to call their bluff, to achieve our own substantive goals, including a right to physician-assisted death. Just think about it: It'll be great. We can get Ashcroft, who is on record supporting states' rights,<sup>116</sup> on the ropes, arguing *against them* in the context of this case.

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<sup>116</sup> See, e.g., Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment, at 42 n.23, *Oregon v. Ashcroft*, 192 F. Supp. 2d (D. Or. 2002) ("The Attorney General appears well aware of the importance of federalism, given his stance on it in *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (upholding the Missouri Constitution's mandatory retirement age for judges in the face of the Age Discrimination in Employment Act of 1967). Further, Presidents from Reagan through Clinton reaffirmed the Executive Branch's devotion to such principles through executive orders. See Exec. Order No. 13132, 64 Fed. Reg. 43255 § 2(a) (Aug. 4, 1999) (Clinton) ('Federalism is rooted in the belief that issues that are not national in scope or significance are most appropriately addressed by the level of government closest to the people.');

Exec. Order No. 13083, 63 Fed. Reg. 27651 (May 14, 1998) (Clinton) (same); President George Bush, *Memorandum on Federalism*, 26 Weekly Comp. Pres. Doc. 264 (Feb. 16, 1990) (reaffirming President Reagan's executive order on federalism); Exec. Order No. 12612, 52 Fed. Reg. 41685 §2(a) (Oct. 26, 1987) (Reagan) ('Federalism is rooted in the knowledge that our political liberties are best assured by limiting the size and scope of the national government.')).

I don't—and can't—pretend to know for certain. All the same, I strongly suspect that some part of this thinking has to strike a responsive chord.<sup>117</sup> Sophisticated lawyers—and lawyers supporting Oregon in the current litigation are nothing if not sophisticated—understand perfectly well how much of the law is politics. But they also know how much the politics of law is supposed to be—and plausibly is—denied. Understanding both is part of what it means to truly understand and perhaps to be committed to the operation of the rule of law.<sup>118</sup> If so, we might perhaps agree on some level that the best justification for the states' rights arguments in play in *Oregon v. Ashcroft* is a political justification, produced by (or within) a deeper commitment to a normative principle about the rule of law.

From where I stand, to say that the best justification for the states' rights arguments in *Oregon v. Ashcroft* is political (which of course it is) is not itself, without more, to indict those claims. But highlighting their liberal political *bona fides* does something more than simply help us to understand how, within a certain, broadly defined commitment to the rule of law, a good liberal might try to satisfy her conscience that it is acceptable to cooperate with the existing doctrine of states' rights in the particular context of a case like *Oregon v. Ashcroft*—even while believing that that doctrine is a total disaster.<sup>119</sup>

Exposing the political justification for the states' rights arguments being made in *Oregon v. Ashcroft* serves another important purpose, as well. It helps to clear the space necessary for me to make the basic argument that I want to make: The politics of the states' rights arguments being made in *Oregon v. Ashcroft* are bad politics that good, committed liberals should resist and reject.

### Politics and Principle Within the Rule of Law

Before articulating some of the reasons why I think liberals should oppose the states' rights arguments being made in *Oregon v. Ashcroft*, let me state in terms that I have not yet mentioned the goal that has led at least some liberals to accept—or make—them. The key here is the liberal ideal of “individual liberty.”<sup>120</sup>

With *Oregon v. Ashcroft* in mind, for instance, Professor Law has announced that “the ongoing federal effort to impose criminal penalties on Oregon doctors who . . . help terminally ill people to hasten their death” is one “example of a

<sup>117</sup> Views like these are already part of the argumentative fabric of *Oregon v. Ashcroft*.

<sup>118</sup> For a thoughtful commentary on the idea of “the rule of law,” see Richard H. Fallon Jr., “The Rule of Law” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1 (1999).

<sup>119</sup> Cf. Ruth Colker, *City of Boerne Revisited*, 70 U. CIN. L. REV. 455 (2002) (“The Supreme Court’s recent decision in *Bush v. Gore*, as contrasted with its prior decision in *City of Boerne v. Flores*, suggests that the conservatives, but not the liberals, on the Supreme Court have heeded [Sylvia Law’s] message that one can and should rely on arguments with which one disagrees philosophically.”).

<sup>120</sup> This could be part of an argument based on some idea of “democratic experimentation.” It doesn’t have to be. If it is, however, the autonomy argument could provide one justification for it. Experimentation in this arena, one could say, promotes individual autonomy. This claim is subject to the objections I mention below.

situation in which people might seek to invoke the Court's new federalism principles to protect individual liberty."<sup>121</sup> In a passage already quoted in part, the Bioethicists' Brief to the Ninth Circuit agrees that it is "clear" that "there are legitimate policy grounds for enacting a statute such as Oregon's[.]" and that that statute, "the Death With Dignity Act[.], . . . enhance[s] the freedom of terminally ill patients[.]"<sup>122</sup>

The logic behind this idea—that states' rights protect individual liberty in *Oregon v. Ashcroft*—appears to be transitive. One starts by supposing that Oregon's permissive assisted suicide law protects individual liberty. From there, one reasons that a principle of states' rights, insofar as it would safeguard Oregon's law against federal override, protects individual liberty, too.

As anyone who has read the Supreme Court's recent states' rights jurisprudence will know, it is commonplace to maintain that states' rights protect individual liberty. Indeed, both the Supreme Court and the Fourth Circuit relied on the very same trope when torpedoing an important part of the federal Violence Against Women Act in a case known eventually as *United States v. Morrison*.<sup>123</sup> In the wake of these and other recent states' rights decisions, liberal-minded critics have maintained that the Supreme Court's new states' rights jurisprudence doesn't so much raise the question of whether states' rights do or don't protect individual liberty, but *whose—and at whose expense?*

Following their lead, I think we should be exceedingly careful before we conclude, once and for all, that respecting the states' authority to regulate medical practice actually protects "individual liberty." But how should we decide?<sup>124</sup>

One approach is the approach that those supporting the State of Oregon in *Oregon v. Ashcroft* would appear to have us take. They would have us view the states' rights claim in isolation, asking ourselves, for instance: In the narrow context of the dispute reflected in *Oregon v. Ashcroft*, does respecting state authority over medical practice "protect individual liberty"? Their answer, presumably, is that it does. I am not so sure.

In commentary published elsewhere, I have observed that:

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<sup>121</sup> Law, *supra* note 12, at 412.

<sup>122</sup> Bioethicists Brief, *supra* note 76, at 14.

<sup>123</sup> *Brzonkala v. Virginia Polytechnic Inst. and State Univ.*, 169 F.3d 820 (4th Cir. 1999)(rehearing *en banc*), *affirmed sub. nom. United States v. Morrison*, 529 U.S. 598 (2000).

<sup>124</sup> I leave to one side the ways in which a states' rights argument in *Oregon v. Ashcroft*, if successful, would appear to leave regulation of physician-assisted suicide to the states, both when states legalized the practice and when they did not. If so, and even supposing, *arguendo*, that laws *permitting* the practice promote individual autonomy, a states' rights decision in *Oregon v. Ashcroft* cannot easily be justified on individual autonomy grounds. For if it is up to the states to decide how physician-assisted suicide will be treated at law, states are free to keep or install bans on the practice. How, in the standard liberal view, does that *promote* individual autonomy—at least if by that we mean to refer to the individual autonomy of dying patients?

Serious concerns about pervasive, persistent, and unjustified social inequalities have prompted a small—but growing—number of academic commentators to raise some hard and troubling questions for those who would like to legalize physician-assisted suicide. In various ways, these commentators have asked: In light of existing social inequalities—inequalities that operate, for example, along sometimes intersecting lines of race, class, age, sex (including sexual orientation), and disability—how persuasive are autonomy-based arguments in favor of [the] legalization of assisted suicide[?] [H]ow persuasive [are those arguments] when [they] depend (as they typically do) on a conception of autonomy that either presupposes social equality or does not expressly account for its absence? How compelling are arguments that we ought to legalize assisted suicide out of feelings of mercy for the sick and dying, when such affective expressions may actually be the socially acceptable manifestation of private ambivalence that includes merciless discrimination? How can we be confident . . . that talk of ‘autonomy’ or ‘mercy’ in the assisted suicide debate gets us anywhere—unless and until such talk squarely confronts discriminatory cultural ideologies and the material forms of discrimination they produce, and expressly objects to the ways discrimination may condition how decisions about life and death are made?<sup>125</sup>

On the level of theory, proponents of assisted suicide have given no adequate reply. Something that they have repeatedly said throughout the *Oregon v. Ashcroft* litigation, however, may be taken as a kind of answer—an answer that is nicely captured and summarized in one line the Bioethicists’ Brief adopts. “Clearly[,]” the Brief insists, “the Death With Dignity Act *in practice* has not produced any of the abuses predicted[.]”<sup>126</sup>

Such pith invites pith back: Oh, really? So much may perhaps be clear to the authors, if not the signatories, of the Bioethicists Brief. Either way, the data about the Oregon experiment with assisted suicide have simply been too thin to bear out such a strongly worded claim: “*Clearly* . . . the Death With Dignity Act *in practice* has not produced *any* of the abuses predicted[.]”

I won’t rehearse all the doubts that have been previously registered.<sup>127</sup> But I would add to them the suggestion that the concerns from an equality perspective, sketched very briefly a moment ago, have not yet been *disproved*. Thus, to those who have and would maintain that the “Death With Dignity Act *in practice* has not produced any of the abuses predicted,” I would simply ask: Can we say that we

<sup>125</sup> Marc S. Spindelman, *Legislating Privilege*, 30 J. L., MED. & ETHICS 24 (2002).

<sup>126</sup> Bioethicists’ Brief, *supra* note 76, at 14.

<sup>127</sup> See, e.g., Kathleen Foley & Herbert Hendin, *The Oregon Experiment*, in *THE CASE AGAINST ASSISTED SUICIDE: FOR THE RIGHT TO END-OF-LIFE CARE* 144 (Kathleen Foley & Herbert Hendin eds., 2002); N. Gregory Hamilton, *Oregon’s Culture of Silence*, in *THE CASE AGAINST ASSISTED SUICIDE: FOR THE RIGHT TO END-OF-LIFE CARE* 175 (Kathleen Foley & Herbert Hendin eds., 2002); Kathleen Foley & Herbert Hendin, *Don’t Ask, Don’t Tell*, 28 HASTINGS CENTER REP., May-June, 1999, at 37; Marc Spindelman, *The Year of Assisting Death: Report on Oregon’s Assisted Suicide Law Paints Too Rosy a Picture*, LEGAL TIMES, Mar. 22, 1999, at 22; Herbert Hendin, Kathleen Foley, & Margot White, *Physician-Assisted Suicide: Reflections on Oregon’s First Case*, 14 ISSUES IN LAW & MED. 243 (1998).

know that existing social inequalities have not improperly tainted the decisions that dying Oregonians have made to take advantage of the states' permissive assisted suicide law? That we know these individuals have been able to afford *and have received* the best palliative and psychiatric care that the practice of medicine can provide that would have eased their suffering short of "hastened death"? How, exactly, do we know that physicians have not assisted suicides because of their own discriminatory views about who, socially speaking, is worthy of life and death, and when? Do we know that physicians have not proven to "be susceptible to affirming women's negative self-judgments" when assisting in women's deaths?<sup>128</sup> Do we know that "the abuses predicted" have not materialized because we have gone beyond the "truncated" accounts of those who have used Oregon's assisted suicide law, because, that is, we have seriously explored and examined the social context in which they lived and died?<sup>129</sup>

Someone may have the kind of thick understanding of how Oregon's assisted suicide law has worked in fact to be able to give complete answers to these—and other similar—questions. I don't. Such detailed information about the operation of Oregon's assisted suicide law has not been made publicly accessible in—or through—the so-called "data" about life and death under Oregon law. Accordingly, should we be inclined to measure the value of "Oregon's experience under the Death With Dignity Act" through the robustness of the information that Oregon officials have publicly provided us, we should not be prepared triumphantly to declare (as some in the *Oregon v. Ashcroft* litigation have) that "the laboratory of the States' is effectively at work in Oregon."<sup>130</sup>

Indeed, the data from Oregon's assisted suicide experiment have so little to say about the legitimacy of the equality-based critiques of legalized assisted suicide, it's hard to see how anyone can, without some big caveats, maintain that the Oregon experience provides reliable and meaningful guidance to "other states as they consider the interests of terminally ill, mentally competent patients who wish to spare themselves severe deterioration prior to death"?<sup>131</sup> (Especially if one means

<sup>128</sup> Susan M. Wolf, *Gender, Feminism & Death: Physician-Assisted Suicide and Euthanasia*, in *FEMINISM AND BIOETHICS: BEYOND REPRODUCTION* 282, 284 (Susan M. Wolf ed., 1996) (emphasis added).

<sup>129</sup> *Id.* at 290 ("Analyzing the early cases against the background of this history [of women's inequality] suggests hidden gender dynamics to be discovered by attending to the facts found in the accounts of these cases, or more properly the facts not found. What is most important in these accounts is what is left out, how truncated they are.")

<sup>130</sup> Bioethicists' Brief, *supra* note 76, at 6. See also, e.g., Plaintiff's Memorandum in Support of Summary Judgment, *supra* note 70, at 44, n.28 (quoting George H.W. Bush) ("In the search for enlightened public policy, individual states and communities are free to experiment with a variety of approaches to public issues."); and *id.* at 44 (quoting Executive Order No. 13132) ("The nature of our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several states according to their own conditions, needs, and desires.")

<sup>131</sup> *Id.*

by that to suggest that Oregon's experience recommends that other states follow Oregon's lead.<sup>132</sup>)

But I digress. *Oregon v. Ashcroft* is not—thankfully or sadly—a rehearing of the Supreme Court's decision in *Washington v. Glucksberg*. Nor is it a judicial referendum on the merits of Oregon's assisted suicide law.

For the sake of the current discussion, I am prepared to suspend my doubts, both theoretical and practical, about what the Oregon data do—or do not—show. I am prepared to assume, at least *arguendo*, that there is some way in which the guardians of Oregon's law can produce and defend their claim that it has protected or “enhanced” the individual liberty of terminally ill Oregonians.

Even so, I cannot find my way to the conclusion that protecting the states' sovereign authority over medical practice will actually protect, rather than harm, individual liberty overall. In this respect, I agree with University of Michigan Law Professor Yale Kamisar who, in a related context, observed several years ago that: If we believe that legal judgments should rest on principles of general significance that produce like results in like cases, we cannot “avoid considering what *other* . . . situations not presently before [us] are (or are not) like cases[.]”<sup>133</sup> In making this suggestion, Professor Kamisar relied on something that Justice Felix Frankfurter once said. Because Justice Frankfurter's thoughts so neatly brick the path of inquiry I have in mind, so, too, will I. “I am aware,” Frankfurter wrote:

that we must decide the case before us and not some other case. But that does not mean that a case is dissociated from the past and unrelated to the future. We

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<sup>132</sup> As the Autonomy Brief explains the point to the Ninth Circuit:

[P]ermitting physician-assisted dying under the Oregon Act benefits our nation. An important attribute of our federalist system is that, in the absence of a valid and constitutional federal regulation, individual communities are left free to experiment with solutions to the difficult problems that confront our society from time to time. *See New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (‘It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country.’) (Brandeis, J., dissenting).

Autonomy Brief, *supra* note 8, at 12. This trope of the “laboratory of the states” has been invoked repeatedly during the current debate. But, of course, it begs the questions of the ethics of the experiment that is going on in the laboratory, including what the experiment might tend to lead to if followed in similar cases. The basic question that I mean to ask about this, for present purposes, is: What is the basis for saying that the laboratory of state experimentation is not (or is no longer) operating with the “lights out” in virtue of Oregon's “experiment” with the practice of assisted suicide? Oral Arguments for Respondent, *Vacco v. Quill*, 521 U.S. 793 (1997), reprinted in 2 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW, *VACCO V. QUILL* 858 (1998) (“The famous state laboratories of Justice Brandeis. . . [t]hese laboratories, however, are now operating largely with the lights out.”).

<sup>133</sup> Kamisar, *infra* note 134, at 749.

[therefore] must decide this case with due regard for what went before *and no less regard for what may come after*.<sup>134</sup>

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I'll come back to the history of states' rights later on. For now, though, I want to give some thought to "what may come after" a decision in *Oregon v. Ashcroft* that respects states' rights. Put squarely, what I mean to ask is: What could one do with the principle that medical regulation is the states'—and not the federal government's—job? If accepted, will such a principle enhance or endanger individual liberty across a range of cases and in the long run?

I begin with some obvious ground. Should it really be the states' job to regulate medical practice, it is difficult to see why a state should not be allowed to regulate or even prohibit abortion, which is a medical practice, after all. Certainly, it's more widely regarded as such than physician-assisted suicide presently is. The same holds true for a range of reproductive choices requiring medical intervention that women are now constitutionally permitted to make. Taken seriously, the idea that medical practice falls within the states' regulatory purview implies that states should ultimately decide how to handle women's medically-mediated reproductive choices.

Responding to this argument, Estelle Rogers has angrily quipped that "[r]eproductive rights . . . are an entirely different matter."<sup>135</sup> Why? The "pivotal" fact, she tell us, "is that [reproductive rights] *are* constitutionally protected."<sup>136</sup> Pulling no punches (and why should she?), Rogers insists that "[t]he fear that state regulators of medical practice could eviscerate the right to abortion with a wave of the hand completely misses the point."<sup>137</sup>

Since Rogers purports to have written this in response to something I previously did, I think that I am entitled to say that she is responding to an argument that I have never made. I have not—and am not—proposing that states, *at present*, can "eviscerate the right to abortion with a wave of the hand."<sup>138</sup> No.

What I have, and am, suggesting is that to stand behind state authority over the practice of medicine, as assisted suicide advocates (and others) now do, is to *draw into question* whether women's medically assisted reproductive choices *should continue to be* constitutionally protected. What I have written is this: "If *Oregon v. Ashcroft* does, indeed, affirm that medical practice rules are within the states' purview, it strengthens—even calcifies—a line of judicial thinking about states' rights

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<sup>134</sup> *West Virginia State Bd. v. Barnette*, 319 U.S. 624, 660-61 (1943) (Frankfurter, J., dissenting) (quoted in Yale Kamisar, *Against Assisted Suicide—Even a Very Limited Form*, 72 U. DET. MERCY L. REV. 735, 750 (1995) (emphasis added)).

<sup>135</sup> Rogers, *A Federalism of Convenience*, *supra* note 28, at 16.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

that is eminently capable of uprooting and overturning the constitutional rights [that] the Court recognized”<sup>139</sup> in a line of cases traceable to *Roe v. Wade*. “In this way, at least,” I have gone on to maintain, “a states’ rights victory for Oregon’s assisted suicide law in *Oregon v. Ashcroft* may actually help the [A]ttorney [G]eneral to launch the frontal assault on women’s reproductive rights [that] many of us have been expecting (and preparing for) for some time.”<sup>140</sup>

If and when that happens, states could, indeed, “eviscerate the right to abortion with the wave of a hand.”<sup>141</sup> What would stop them? I do not doubt that Estelle Rogers or her colleagues have anything but the best of intentions. Nor do I doubt that they are concerned with, have fought for, and support reproductive rights. I have never questioned this.

But even the best intentions, including theirs, I am afraid, will not be enough to keep a court from using the states’ rights principle being advocated in *Oregon v. Ashcroft*, to strip women of their—for now—constitutionally-protected reproductive rights. Nor will women be protected by the hope, no matter how fervent (a hope I should add, I share) that it is “unimaginable” that we will return to the days before *Roe*. It might be enough to recall the truth behind Professor Law’s observation that: “*Roe* is always hanging by a thread.”<sup>142</sup> If Law is right, why is a decision affirming that medical practice regulation is within the states’ exclusive regulatory domain not weighty enough to break that thread? Defenders of physician-assisted suicide maintained throughout the *Washington v. Glucksberg* (and *Vacco v. Quill*<sup>143</sup>) litigation that, as a matter of principle, the right to assisted suicide and the right to abortion move in tandem.<sup>144</sup> Is this not (or no longer) so?

The threat to women’s reproductive rights posed by the states’ rights arguments being advanced in *Oregon v. Ashcroft* are urgent and concrete, not hypothetical. Underlining their importance in the current litigation is the willingness that some liberal defenders of Oregon’s law have shown to offer up women’s equality

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<sup>139</sup> Spindelman, *Protecting Suicide and Hurting Women*, *supra* note 28, at 51.

<sup>140</sup> *Id.*

<sup>141</sup> Rogers, *supra* note 28, at 16. I do, of course, realize that there may be risks to women’s abortion rights either way. See, e.g., Lowenstein & Wanzer, *supra* note 10, at 448. My effort here is not designed to evaluate which of these risks are greater (that may be for later on), but rather to observe that proponents of states’ rights in *Oregon v. Ashcroft* have not discussed or analyzed how their position, too, potentially threatens women’s reproductive rights.

<sup>142</sup> Jeffrey Rosen, *Why We’d Be Better Off Without Roe*, THE NEW REPUBLIC, Feb. 24, 2003, at 15, 16 (quoting Professor Sylvia Law, commenting on the status of *Roe* in the pages of Women’s E-news). Should more be needed, we could recall more, including this: That only a few short years ago, it seemed “unimaginable” to many of us that the Supreme Court’s states’ rights doctrine would have the kind of traction it has already had, enabling it to endure and to expand into the very domain of civil and equality rights that, years ago, or so we had thought, was the field of struggle on which we read the doctrine of states’ rights its last rites, and (at least as project for the federal courts) declared its demise.

<sup>143</sup> 521 U.S. 793 (1997).

<sup>144</sup> *Washington v. Glucksberg*, 521 U.S. 702, 726-27 (1997).

rights in life in order to secure ostensibly gender-neutral rights to “dignity” in death. Proponents of the states’ rights arguments in *Oregon v. Ashcroft* have not infrequently staked those claims, in part, on the Supreme Court’s recent decision in *United States v. Morrison*.<sup>145</sup> That decision, which we encountered before (no coincidence there), drew on ideas about states’ rights to deal a staggering blow to the federal government’s ability to address the national problem of gender-based sexual violence. Astonishingly, liberal protectors of Oregon’s permissive assisted suicide law have brandished *Morrison* as a weapon to beat back the Attorney General’s attempt to deliver the law its coup de grâce.

As only a mode of legal strategy, there may be nothing objectionable about using *Morrison* in this fashion. Doing so violates no existing rule of professional ethics of which I am aware. But that does not mean that this is how *Morrison* should be used. And it shouldn’t be—unless one is prepared to accept and capitalize on the constitutional protections that *Morrison* effectively accorded to perpetrators of sexual violence, violence that regularly results in women’s deaths—as a predicate for the “right” to end one’s own life. Not everyone is.

All this should precipitate some serious concern for liberals, and especially liberal defenders of *Roe v. Wade*.<sup>146</sup> But it isn’t only women’s reproductive (and other) rights that are potentially up for grabs if the states’ rights gambit defenders of Oregon’s law have played should succeed. The line between medical practice and medical experimentation is notoriously thin.<sup>147</sup> If states have the authority to regu-

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<sup>145</sup> 529 U.S. 598 (2000). See, e.g., Appellee’s Brief of the State of Oregon, *passim*, *Ashcroft v. Oregon*, No. 02-35587 (9th Cir., 2003); Brief of the Patient Plaintiffs-Appellees, at 44, *Ashcroft v. Oregon*, No. 02-35587 (9th Cir., 2003).

<sup>146</sup> 410 U.S. 113 (1973).

<sup>147</sup> See NATIONAL COMMISSION FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, THE BELMONT REPORT: ETHICAL PRINCIPLES AND GUIDELINES FOR THE PROTECTION OF HUMAN SUBJECTS OF RESEARCH (2) (1978) (“A. Boundaries Between Practice and Research. The distinction between practice and research is blurred partly because both often occur together (as in research designed to evaluate a therapy) and partly because notable departures from standard practice are often called ‘experimental’ when the terms ‘experimental’ and ‘research’ are not carefully defined.”); Robert J. Levine, *Preliminary Papers Prepared for the Commission: The Boundaries Between Biomedical or Behavioral Research and the Accepted and Routine Practice of Medicine*, in APPENDIX: VOLUME I: THE BELMONT REPORT: ETHICAL PRINCIPLES AND GUIDELINES FOR THE PROTECTION OF HUMAN SUBJECTS OF RESEARCH 1-1 (1978) (“Even a superficial exploration of this problem [of the boundaries between biomedical or behavioral research involving human subjects and the accepted and routine practice of medicine] will reveal the impossibility of describing mutually exclusive subsets (one called research and one called practice) of the universe of activities in which health care professionals may be engaged.”); see also, e.g., ROBERT J. LEVINE, *ETHICS AND THE REGULATION OF CLINICAL RESEARCH* 3 (2d ed. 1986) (“Although distinguishing research from practice might not seem to present serious problems, in the legislative history of PL 93-248, the act that created the [National] Commission [for the Protection of Human Subjects of Biomedical and Behavioral Research], we find that some very prominent physicians regarded this as a very important and exceedingly difficult task.”); Boundaries Between Research and Practice, in APPENDIX: VOLUME II: THE BELMONT REPORT: ETHICAL PRINCIPLES AND GUIDELINES FOR THE PROTECTION OF HUMAN SUBJECTS OF RESEARCH III (1978) (collecting seven essays discussing research-practice boundaries); Is-

late the practice of medicine, what is to stop someone or more of them from defining medical practice broadly to include procedures we might now regard as experimental?<sup>148</sup> If the definition of what does and doesn't constitute the practice of medicine is exclusively within the jurisdiction of the states, what could become of the current federal regime designed to ensure the ethics of human subjects research and the "individual liberty" of its human subjects? Why wouldn't states succumb to the pressures of the medical research establishment to make research and development efforts cheaper? Why wouldn't states do what they could to make or keep, among others, their friends in the pharmaceutical industry as happy as they can—especially in those states with a strong biotechnology industry?<sup>149</sup>

These possibilities, I realize, may sound far-fetched. But against the tendency to think they go (well) beyond any argument being made in the *Oregon v. Ashcroft* litigation, let's not forget that, on one level, Oregon's experience with physician-assisted suicide is itself an experiment that has been defended as such by its supporters.<sup>150</sup> Seen from that perspective, the states' rights logic that the district court's decision is said to have "confirmed" moves in the direction of a declaration that federal intervention in state-sponsored or state-authorized medical experimentation is beyond the pale. If so, can we say that vindicating states' rights in *Oregon v. Ashcroft* really does—or will—protect "individual rights"? Can liberals afford to be insensitive to the possibilities that they won't?

The dangerous implications of the states' rights arguments being made in *Oregon v. Ashcroft* go on and on. How would existing or future national health care programs—which shape and structure, and of course, regulate the practice of medicine—fare if the federal government must get out of the medical regulation business? Unless one imports a formalistic distinction between, say, the "direct" and the "indirect" regulation of medical practice or between the "primary" and "secondary"

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rael Goldiamond, *On the Usefulness of Intent for Distinguishing Between Research and Practice, and Its Replacement by Social Contingency: Implications for Standard and Innovative Procedures, Coercion and Informed Consent and Fiduciary and Contractual Relations*, in APPENDIX: VOLUME II: THE BELMONT REPORT: ETHICAL PRINCIPLES AND GUIDELINES FOR THE PROTECTION OF HUMAN SUBJECTS OF RESEARCH 14-2 (1978) ("Even when practice and research are separated, it seems to be generally accepted by reviewers that treatment is often indistinguishable from experimentation."); David Sabiston, *The Boundaries Between Biomedical Research Involving Human Subjects and the Accepted or Routine Practice of Medicine, with Particular Emphasis on Innovation in the Practice of Surgery*, in APPENDIX: VOLUME II: THE BELMONT REPORT: ETHICAL PRINCIPLES AND GUIDELINES FOR THE PROTECTION OF HUMAN SUBJECTS OF RESEARCH 17-1 (1978) ("[T]here is no dividing line which can be consistently agreed upon by any group of authorities on the subject [of the research-practice boundary]. In fact, it is generally recognized that such an arbitrary division is simply impossible, at least if determined on a rational basis.").

<sup>148</sup> This might be defended on "autonomy" grounds, too. See, e.g., Beauchamp *et al.*, *Pharmaceutical Research Involving the Homeless* (unpublished manuscript on file with the author).

<sup>149</sup> For some discussion of this "race to the bottom" problem in the state environmental protection arena, see, e.g., Kirsten H. Engel, *State Environmental Standard Setting: Is There a "Race" and is it "To the Bottom?"* 48 HASTINGS L. J. 271, 275 (1997).

<sup>150</sup> See *supra* notes 130-132 and accompanying text.

regulation of it—distinctions that have, at times, surfaced in the current litigation<sup>151</sup>—these programs could be ruled out of bounds, too.<sup>152</sup>

And even if one were to incorporate such formalistic distinctions into the principle that states are the proper level of government at which to regulate the practice of medicine, what assurances do we have that they wouldn't turn out to be short-lived? That they would not soon give way to a more robust understanding of states' rights? The doctrine of states' rights, after all, looks in important ways like the law of life and death does: rife with what Professor Thomas Mayo eloquently calls "lost distinctions of former significance."<sup>153</sup> And why shouldn't it? Was Justice Benjamin Cardozo wrong when he spoke about "the tendency of a principle to expand itself to the limits of its logic"?<sup>154</sup>

If Cardozo was right, what's next?<sup>155</sup> Should we follow the states' rights principle being offered in *Oregon v. Ashcroft*, what are we to conclude about the authority of the federal government—should it ever, unhappily, come to it—to institute mass inoculations against biochemical threats to the American public?<sup>156</sup> To prohibit involuntary sterilization? What about a national judgment that the medical administration of a death sentence is not a legitimate medical practice? A national

<sup>151</sup> See, e.g., Brief for Amicus Curiae American Public Health Association Supporting Plaintiff-Appellees and in Support of Affirmance, at 5, *Ashcroft v. Oregon*, No. 02-35587 (9th Cir., 2003) ("[D]irect control of medical practice in the states is beyond the power of the federal government." (quoting *Linder v. United States*, 268 U.S. 5, 18 (1925)) (internal quotation marks omitted and emphasis added)) [hereinafter, APHA Brief]; *id.* at 4 ("the states, and not the federal government, have primary authority to regulate health care") (emphasis added).

<sup>152</sup> The theory that the federal government may not regulate the practice of medicine directly, but only indirectly, would be amply supported by the Supreme Court's decision in *Schechter Poultry*. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546 (1935) (affirming that Congress may regulate intrastate transactions that affect interstate commerce directly, but not indirectly). Only thing is, I thought that the hard formalism of *Schechter Poultry* had pretty much fallen out of favor in *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1 (1937), which (so far as I am aware) has not been expressly overruled.

<sup>153</sup> Thomas Mayo, *Constitutionalizing the "Right to Die,"* 49 MD. L. REV. 103, 144 (1990).

<sup>154</sup> BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 51 (1921).

<sup>155</sup> See *Bristol Meyers Squibb v. Shalala*, 91 F3d 1493 (D.C. Cir. 1996) (The Food, Drug, and Cosmetic Act doesn't allow the FDA to regulate how a physician prescribes a medication once it has been approved.).

<sup>156</sup> Interestingly, the American Public Health Association's Brief to the Ninth Circuit in *Oregon v. Ashcroft* doesn't provide any tremendously helpful distinction between mass public inoculations on the one hand and physician-assisted suicide on the other. See APHA Brief, *supra* note 153. Not surprisingly, given the importance of the national public health projects the federal government has erected and maintained, for years, the APHA Brief is very careful to limit its arguments in favor of leaving the practice of physician-assisted suicide to the states, chiefly to the value of state experimentation in this arena and the disutility to public health of federal intervention in it. See, e.g., *id.* at 3-4, 10-30. As for the "experimentation" theory, I discuss its limitations elsewhere. See *supra* notes 125-132 and accompanying text. As for the disutility to the public health of federal intervention in this arena, others have canvassed this problem, and I won't rehearse their arguments here. See, e.g., Herbert Hendin, *Ashcroft v. Oregon* (on file with author).

judgment that it is unacceptable to force criminal defendants to take drugs in order to stand trial—or be executed? If the rights of states to control the practice of medicine is our touchstone, is there anything *to* conclude other than that federal projects like these are beyond the pale?

Those familiar with the political lineage of states' rights should not be taken aback by the idea that defending Oregon's assisted suicide law in the name of the states' authority to control medical practice doesn't bode well for liberal goals. With Justice Frankfurter's admonition to give "due regard for what came before" in mind, let's quickly recall some of the foul history of states' rights.

Both over the years and recently, states' rights have provided a safe-harbor for a range of unjust social practices and conditions. States' rights have been used to uphold slavery<sup>157</sup> and later, racial segregation in public and private life.<sup>158</sup> Deference to states' rights has likewise been integral to women's social subordination, keeping women from receiving protections against physical and sexual violence in both the public and private spheres.<sup>159</sup>

States' rights thinking has even operated to allow the states to discriminate against lesbians and gay men or to do nothing to address such discrimination. And in recent years, states' rights have been raised as a roadblock to federal efforts designed to address—and end—age<sup>160</sup> and disability discrimination.<sup>161</sup>

As a matter of practice, if not necessity, states' rights have done nothing—certainly, nothing very much—to promote the "individual liberty" of members of socially subordinated groups. Far less has it been used as a tool to promote—rather than hinder—their equality.

In light of this history, what should liberals do? Should we now, as proponents of states' rights in *Oregon v. Ashcroft* appear to believe, legitimate the doctrine of states' rights and its history, including its substantive applications? Validate the doctrine *in toto* to get a right or two that we happen to like? Entrench it and weaken the federal government when it has momentarily taken a sharp turn to the right?

<sup>157</sup> *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

<sup>158</sup> There is a complex, but often overlooked, history between the Warren Court's "criminal procedure" revolution, its treatment of states' rights, and the way states' rights were invoked as a cover for racist projects. For some discussion of that history, see Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000); Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249 (1968). See also, generally, YALE KAMISAR, WAYNE R. LAFAVE, JEROLD H. ISRAEL, & NANCY KING, *MODERN CRIMINAL PROCEDURE: CASES—COMMENTS—QUESTIONS* 51-54 (10th ed. 2002).

<sup>159</sup> *United States v. Morrison*, 529 U.S. 598 (2000). For commentary on *Morrison*, see, e.g., Catharine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135 (2000).

<sup>160</sup> *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2002); Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1 (2003); William J. Rich, *Taking "Privileges and Immunities" Seriously: A Call to Expand the Constitutional Canon*, 87 MINN. L. REV. 153 (2002).

<sup>161</sup> *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); see also Smith, *supra* note 160; and Rich, *supra* note 160.

What does such cynicism teach? Where's the insistence by liberals that we can—and should—set our own agenda?

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In a thoughtful essay on complicity, Georgetown University philosopher Margaret Little proposes that “one is complicitous when one endorses, promotes, or unduly benefits from norms and practices that are morally suspect.” “[T]he worst cases,” she writes, “are those that involve explicit (if sometimes subtle) endorsement and exploitation of the norms and practices themselves.”<sup>162</sup> Though Professor Little isn't writing about the states' rights debate in *Oregon v. Ashcroft*, her reflections on complicity are applicable to it.

They remind us, among other things, that liberal endorsement and promotion of states' rights norms render liberals complicitous with those norms—especially when, as in *Oregon v. Ashcroft*, we endorse and exploit them, whether cynically or not, to serve our own ends. We will not find “absolution from complicity,” as we might like to do, just because we don't *want* states' rights principles to be applied illiberally.<sup>163</sup> What matters is what we do, not the intentions with which we do it.

But who is to say what it is that we do by endorsing a constitutional principle of states' rights to resolve the dispute in *Oregon v. Ashcroft*? We are. The liberal's choice to rely on such principles when litigating or when deciding *Oregon v. Ashcroft*—particularly because it is possible to handle the case on other grounds—sends the message that the time has now come to abandon our longstanding opposition to the judicial enforcement of the doctrine of states' rights. That we have lost that battle, and should accordingly submit to conservative constitutional principles and programs—principles and programs that have been advanced at liberalism's expense, in the name of states' rights.

This, of course, may not be the message that liberals who fancy a states' rights disposition of *Oregon v. Ashcroft* seek to convey. But as with legal rules, so with life: We write not only for ourselves. As Professor Little explains:

Clearly, one should not be held hostage to all possible interpretations of our actions, to all the meanings others might attach to our behavior. But it is negligence to ignore the interpretations that others may naturally be expected to place on our actions given the broad context in which they take place. That is, while one is not responsible, for instance, when others willfully or negligently misinterpret one's actions, one cannot simply turn a blind eye to all but the meanings one *wishes*

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<sup>162</sup> Margaret Olivia Little, *Cosmetic Surgery, Suspect Norms, and the Ethics of Complicity*, in ENHANCING HUMAN TRAITS: ETHICAL AND SOCIAL IMPLICATIONS 162, 170 (Erik Parens ed., 1998). For some especially interesting—and related—thoughts on complicity from a sex equality perspective, see, e.g., CATHARINE A. MACKINNON, “*More Than Simply a Magazine*”: *Playboy's Money*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 134 (1987); CATHARINE A. MACKINNON, *On Collaboration*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 198 (1987).

<sup>163</sup> Little, *supra* note 162, at 171.

others would see in our actions: we have a duty to forestall those interpretations that, while unintended, would be completely natural given the larger background context in which the action takes place.<sup>164</sup>

Where does all this leave us? What does it recommend that liberals should do as *Oregon v. Ashcroft* proceeds?

It seems to me perfectly fair for us to draw public attention to the Attorney General's unprincipled approach to states' rights. We should note that that approach, not entirely unique to the Attorney General, is part of the reason why liberals have been—and remain—so deeply skeptical about states' rights and their rehabilitation by (judicial) conservatives. But this is a far cry from reasoning that the Attorney General's commitment to that recuperative endeavor is binding on not only him, but also everyone else, as a matter of law.

What liberals should be searching for are ways to resolve the conflict presented in *Oregon v. Ashcroft* that do not make—or risk making—liberals complicitous with the constitutional doctrine of states' rights. Indeed, as Justice John Paul Stevens, speaking for himself and Justices Souter, Ginsburg and Breyer, has suggested, liberals should *oppose* the Supreme Court's recent federalism decisions “whenever the opportunity arises.”<sup>165</sup>

There are numerous ways liberals could mount such opposition in *Oregon v. Ashcroft*. But whether or not we go that far, whatever particular path we choose to follow as the liberal path in *Oregon v. Ashcroft*, this much should now be clear: The path should not be one that embraces or promotes a judicially-enforced constitutional principle of states' rights. Too much that we, as liberals, care about, and care about deeply, is imperiled should we make the wrong—which is to say, the illiberal—choice.

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<sup>164</sup> *Id.* at 173 (emphasis in original). Cf. Marc S. Spindelman, *Some Initial Thoughts on Sexuality and Gay Men with AIDS in Relation to Physician-Assisted Suicide*, 2 GEO. J. GENDER & L. 91 (2000).

<sup>165</sup> *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 98-99 (2000) (Stevens, J., dissenting) (“[T]he kind of judicial activism manifested [in recent Supreme Court federalism decisions] . . . reflects such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises.”).