Abstract: Since the United States Supreme Court invalidated a portion of the Defense of Marriage Act in United States v. Windsor, many lower courts have addressed the constitutional issues raised by state laws prohibiting same-sex couples from marrying. Most lower courts have struck down such laws. Most observers believe that the Supreme Court will consider the issue in the very near future. In thinking about the constitutional issues, I think it would be useful to recall the Court’s relatively recent experience with another contentious social issue that the Constitution does not address with any clarity. 

In its 1997 decisions in Washington v. Glucksberg and Vacco v. Quill, the Court surprised many observers and upheld state laws banning assisted suicide. I think that these decisions were correctly decided. Perhaps more importantly, these decisions reveal the benefits of judicial humility. The decisions have not ended societal debate about assisted suicide and the law has moved slowly in favor of legalizing assisted suicide. But because the Supreme Court did not purport to resolve the issue with a stroke of the pen, this ongoing debate has been better informed. I think the Supreme Court should take the same approach when it considers the constitutionality of laws prohibiting same-sex couples from marrying. Such an exercise of judicial humility would allow the societal debate on this issue to continue without the distorting effects of the Court’s intervention.

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The Supreme Court’s decision in United States v. Windsor was obviously an important decision. Since the decision was issued in June 2013, commentators have evaluated the decision and its implications. Many courts, too, have wrestled with the opinion. It is likely that the United States Supreme Court will address the constitutionality of state restrictions on same-sex marriage in the near future.
In thinking about the constitutional issues raised by state prohibitions of same-sex marriage, I think it might be helpful to focus on the Court’s experience with another social issue of great significance that the Constitution does not address with any clarity. I have in mind the Court’s experience with assisted suicide.

It is easy to forget that in the mid-1990s the momentum seemed to be all in favor of legalizing the “right to die,” either by legislative action or by judicial decisions striking down laws banning assisted suicide. A key support for this momentum was the United States Supreme Court’s 1992 decision in *Planned Parenthood v. Casey*. In *Casey*, the joint opinion infamously declared that “at the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, of the mystery of human life.” This passage has been read—with some justification—as supporting the idea that moral relativism is a constitutional command. In the mid-1990s, some lower courts cited this expansive language in *Casey* in support of a fundamental right to assisted suicide. These opinions ignored the opposition to assisted suicide in our history and tradition and appealed to *Casey*’s abstract rhetoric. These opinions regarded the broad language as “highly instructive” and “almost prescriptive” in resolving the assisted suicide issue. According to this view, “the right to die with dignity accords with American values of self-determination and privacy regarding personal decisions.” I think it is worth remarking that one of the key opinions taking this view was written by Judge Stephen Reinhardt of the Ninth Circuit, and although it is a bit simplistic to view things this way I think Judge Reinhardt’s views are a good barometer of the views of the courts and the legal academy.

In 1997, in *Washington v. Glucksberg* and *Vacco v. Quill*, however, the Supreme Court rejected the constitutional challenges to laws banning assisted suicide. The Court rejected the idea that there is a fundamental right to assisted suicide. In so doing, the Court refused to rely on the broad, abstract language from *Casey* and instead inquired whether there was any support for the view that a right to assisted suicide was deeply rooted in our Nation’s history and tradition. The Court carefully reviewed
the relevant history and stated: “we are confronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults. To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State.” In *Glucksberg*, unlike in *Roe v. Wade* or in *United States v. Windsor*, the Court was unwilling to take that step.

*Glucksberg* and *Vacco v. Quill* were enormously important decisions. The Court’s decisions largely moved the issue of assisted suicide out of the federal courts and left the issue largely to a state-by-state battle through the democratic process. In fact, the Court made that point explicitly. The Court stated: “[t]hroughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.” In an era when we are accustomed to the federal courts assuming a dominant role on important social issues, that approach seems almost quaint.

The 1997 Supreme Court decisions brought a halt to the momentum in favor of a right to assisted suicide and undermined the moral case in favor of assisted suicide. The United States Supreme Court decisions, which were of course limited to federal constitutional arguments, were greatly influential when state Supreme Courts in Florida and Alaska rejected arguments that there was a fundamental right to assisted suicide under the Florida and Alaska constitutions.

Since *Glucksberg* and *Vacco v. Quill*, the effort has largely shifted to a legislative battle. Here, supporters of assisted suicide have met with some success. Oregon’s Death with Dignity Act was passed in 1994 and went into effect in 1997; similar laws have been adopted in Washington and Vermont. Court decisions in Montana (2009) and New Mexico (2014) have also opened the door to physician-assisted suicide in those states. The New Mexico court decision from January 2014 is on appeal. Other recent efforts to
legalize assisted suicide in Massachusetts and Connecticut and New Hampshire have not met with success.

Despite a few victories, the situation in the United States has been relatively stable for the last two decades. Since the Supreme Court’s decisions in 1997, the right to die movement has not had significant success either in legislative arenas or in influencing public opinion. The situation would be vastly different if Glucksberg and Quill had come out the other way.

The dynamic has been very different in other areas. In Roe v. Wade, the Court effectively struck down the abortion laws of every state in the Union. This, of course, did not “resolve” the abortion controversy, as the Casey joint opinion claimed, but the Court’s decision in Roe fundamentally altered the political landscape through the creation of a fundamental constitutional right to abortion. The debate about abortion has continued but the Court’s decisions, which prevent states from prohibiting abortion at any time during pregnancy, are wildly out of line with the views of most Americans. Moreover, the Court’s decisions have, in the view of many, increased the discord. As Justice Scalia summarized this point in his Casey dissent: “by foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.”

The Court’s 2013 decision in United States v. Windsor is also instructive. In Windsor, the Court held unconstitutional section 3 of the Defense of Marriage Act, which defined “marriage” and “spouse” for purposes of federal law. The Windsor Court seemed keen to avoid a sweeping ruling, but the Court strongly influenced the subsequent debate in a way that a deferential ruling upholding DOMA would not have done. And Justice Scalia seems to have accurately predicted that the Court had effectively decided the constitutionality of state laws limiting marriage to heterosexual couples.
In contrast, with its decisions in *Glucksberg* and *Quill*, the Court left the issue to the democratic process. The debate has continued without the distorting effect of the Supreme Court’s intervention. Defenders of the traditional sanctity of life ethic have been able to advance their views without having to counteract the Supreme Court’s view, as Justice Scalia noted in his *Windsor* dissent, that they are “enemies of the human race.”

And we see the benefits to the Court’s exercise of judicial humility. Because the Court did not dictate one national solution, we see an ebb and flow in the debate about assisted suicide and euthanasia. And the ongoing debate is better informed. Debates in states that are considering legalizing assisted suicide can draw from the experience in the states or countries where assisted suicide is legal. And this is done all the time. Advocates, on both sides, frequently cite the Oregon experience (the US state where assisted suicide has been legal for the longest period of time) or the experiences in the Netherlands or Belgium. And the lessons of experience may prompt a re-examination. For example, a Dutch professor (Theo Boer), who has long supported the Dutch laws and even serves on a review committee that monitors cases of euthanasia, recently wrote a column urging that England not go down the same path as the Netherlands. His re-evaluation was prompted by the experience he has witnessed first-hand. He used to think that instances of euthanasia could be regulated but now says that he was wrong, terribly wrong. He notes that “some slopes truly are slippery” and that “once the genie is out of the bottle, it’s not likely to ever go back in again.”

It is clear that the current debate on assisted suicide is better informed than it was back in the mid-1990s when *Washington v. Glucksberg* was working its way through the courts. Some of the discussion in that case (Judge Reinhardt’s opinion is a great example) now seems incredibly naïve. Because the Court’s rulings allowed states to serve as laboratories of experiment, we know more than we did twenty years ago. This experience is particularly valuable when dealing with an issue that the Constitution does not clearly withdraw from the democratic arena.
I think that we have seen democracy in action on the issue of same-sex marriage. But that democratic debate largely preceded the Windsor decision. In the mid-1990s, the democratic branches did address the issue (without the Supreme Court’s help). The Supreme Court’s contribution to the issue (the 1972 decision in Baker v. Nelson) did not preempt the democratic debate. So, in the mid-1990s, we saw Congress address the issue (in DOMA) and then the states (as seen with the mini-DOMAs). There was, of course, some movement in favor of same-sex marriage in the years immediately before Windsor, but that movement (some of which came from the courts and some through the democratic process) was not dictated by the US Supreme Court imposing a national solution to the issue through a creative interpretation of the US Constitution. The debate was far more localized.

The Court did not in Windsor clearly impose a national solution, although the Court put a thumb on the scale that has greatly influenced the subsequent developments. These developments, which since Windsor have largely taken place in the courts, have left much to be desired. In his recent opinion upholding Louisiana’s ban on same-sex marriage, Judge Feldman stated: “The [post-Windsor decisions] thus far exemplify a pageant of empathy; decisions impelled by a response of innate pathos. Courts that...appear to have assumed the mantle of a legislative body.” The judicial decisions have been long on rhetoric and short on convincing discussions of legal doctrine. I suspect that is largely due to the baneful influence of Justice Kennedy’s example in Windsor, which was “doctrinally obscure” and also filled with name-calling (an example of “the jurisprudence of denigration,” as Steve Smith has noted). In addition, the judicial opinions’ treatment of social science evidence has been less than inspiring. I think these opinions share much in common with Judge Reinhardt’s opinion in Compassion in Dying, which was characterized by sweeping conclusions that went well beyond the evidence before him, and Judge Walker’s opinion in Perry v. Schwarzenegger, which was criticized on these same grounds by Justice Alito’s opinion in Windsor.
There is a temptation for all of us, I think, to try to predict social trends. But it is worth noting that those predictions are sometimes wrong. With regard to abortion, it seemed to some (perhaps the Justices on the Supreme Court) that opinion (or at least enlightened opinion) was moving in favor of the right to an abortion. But that’s not what has happened. There is increasing pro-life sentiment and this is particularly apparent among young people. With regard to assisted suicide, the trends in the mid-1990s seemed all in favor of the right to die. There are some worrisome trends on this general issue but the Supreme Court has not controlled the debate to any degree and the developments have not been in a straight line. Popular opinion has been relatively stable on the issue for the last two decades.

I think we ought to have the same caution with regard to same-sex marriage. Most seem to think that the trends are inevitably moving in favor of support for same-sex marriage. But questions have been raised about the validity of these polls for some time now and the recent Pew poll (from a few weeks ago) shows a drop in support for same-sex marriage. An exercise of judicial humility would allow time for further consideration of the issue.

An exercise of judicial humility in *Windsor* would not have prevented change on this issue. The change though would likely have been slower and more deliberate and, over a period of time, better informed (much as we’ve seen after *Washington v. Glucksberg*). And this would have taken place without the distorting impact of the Court’s “help.”

The Court will almost certainly have a chance to address this issue in the very near future. When it does so, I think it would be advisable for the Court to exercise the virtue of judicial humility. I doubt whether this will happen. Humility is not a popular virtue. Most of the incentives for the Justices pull in the other direction. As Justice Scalia noted in his *Casey* dissent, “no government official is ‘tempted’ to place restraints upon his own freedom of action, which is why [he noted that] Lord Acton did not say ‘Power tends to purify.’ The Court’s temptation [Justice Scalia maintained] is in the quite opposite and more
natural direction—towards systematically eliminating checks upon its own power....” Justice Scalia observed that the Court “succumb[ed]” to this temptation in Casey and I suspect that it will do so again when it faces the constitutionality of state bans on same-sex marriage.