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STATE CONSTITUTIONS AS THE FUTURE FOR CIVIL RIGHTS*

Erwin Chemerinsky**

In March 1993, my father was a hospital in Hammond, Indiana, dying from lung cancer. The cancer had spread; the tumor had grown so much that it was cutting off circulation to his arm. It had become grotesquely swollen. There was concern that gangrene would set in. A doctor wanted to amputate his arm. My dad who was fully lucid said he was going to soon die and it didn't matter whether he died from the lung cancer or gangrene, he didn't want his arm amputated.

On Monday, March 15, the doctor came into his room in the afternoon. I and my siblings were in the hospital room. My dad said to the doctor, "I know I'm never to get out of this hospital bed, can you simply increase the amount of morphine you give me so that I don't wake up?" The doctor very rudely said, "No, we can't do that," and the doctor began to turn away. My dad, until the end, was quite persistent, and he said that he was either drugged in unconsciousness or in excruciating pain. He again asked the doctor to please just add enough morphine to end his life. The doctor didn't say anything; he simply turned his back on my father and walked out of the room. My dad died four days later on March 19. He never did get out of that hospital bed. And, I will never understand the interest the State of Indiana had in prolonging my dad's life for those four days.

The law is no different today in Indiana than it was in March 1993, even though almost 25 years have gone by since my dad passed away. Still in Indiana, there is no right to physician assisted death. That remains true in the vast majority of states throughout the country. Why is it that there's been so little progress in this area? What does it tell us more generally about constitutional rights, and what should we do about it as we look to the foreseeable future? Those are the questions that I want to address. I divide my remarks into four points.

First, there is not a right to physician assisted death and there's not going to be a federal constitutional right for the foreseeable future. In fact, we are likely to see very little expansion when it comes to individual rights under the United States Constitution for the foreseeable future. It is important to put this in an historical context. The Warren Court, which existed from 1954-1969, brought about a tremendous expansion in civil rights and civil liberties. It was the Warren Court that was largely responsible for applying the Bill of Rights to state and local governments. It was the Warren Court that recognized countless new liberties. For example, it was the Warren Court that for the first time said there is a right to privacy found under the U.S. Constitution, including a right to purchase and use

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contraceptives. It was the Warren Court that said there is a right to travel under the Constitution.

But all of this changed at the end of the Warren Court in 1969. Between 1969 and 1971, Richard Nixon got to appoint four justices to the Supreme Court. From 1971, when Richard Nixon's third and fourth justices were confirmed for the Court, to February 13, 2016 when Justice Anton Scalia died, there were always at least five and sometimes as many as eight justices appointed by Republican presidents. Since 1971, only on rare occasions has the Supreme Court found new individual liberties or expanded individual rights.

I think a key case in this regard was early in the Burger Court era, in 1973, in *San Antonio Board of Education v. Rodriguez*. This was a challenge to the Texas system of funding public schools largely through local property taxes. This resulted in tremendous disparities. Wealthy suburbs could tax at a low rate of assessment and generate a great deal to spend on education, but poor areas were taxed at a high rate and had little to spend on education. The Supreme Court, however, 5-4, found no violation of the Constitution. All four Nixon appointees were in the majority, joined by Eisenhower appointee, Potter Stewart. Justice Lewis Powell wrote for the Court and said there is no right to education under the United States Constitution.

If there's no right to education, it's hard to imagine what other rights the Court will find to be protected. I can count on less than the fingers of one hand the additional constitutional rights there were recognized by the Supreme Court since 1971. Of course, there's *Roe v. Wade* and the right to abortion in 1973. There are Supreme Court cases expanding rights for gays and lesbians. *Lawrence v. Texas* which was decided in 2003, which says that a state cannot criminally punish private consensual same-sex sexual activity. *Obergefell v. Hodges* in 2015 said that state laws that prohibit same-sex marriage are unconstitutional. But I challenge anyone in this room to think of many instances beyond these where the Supreme Court has recognized new constitutional rights in the last 45 years.

If you focus on the subject for today's wonderful conference, we see again the Supreme Court refusing to recognize what I see as one of the most fundamental aspects of autonomy, the right to death with dignity. Earlier in the conference, there was a brief mention of *Cruzan v. Director Health Services* from 1990, but what wasn't mentioned was that Chief Justice Rehnquist's majority opinion said that the Court was assuming without deciding that competent adults have a right to refuse life-saving medical treatment, including food and water. To be sure, Justice O'Connor in a concurring opinion, and the four dissenting justices, said they believe such a right exists. But to this moment, never has the U.S. Supreme Court said that there is a fundamental right of competent adults to refuse medical treatment. And, of course, there was much discussion at this conference of the Supreme Court decisions in 1997, *Washington v. Glucksberg* and *Vacco v. Quill*, where the Supreme Court reversed two federal courts of appeals, the 9th Circuit and the 2nd Circuit, and unanimously held that there is no right physician assisted death. This then is the context for this program. This is the context for talking about the right for physician aid in death. It's the context for talking about constitutional rights more generally.

It's worth pausing for a moment and asking why. My answer to that question is it's been the hostility of conservative justices on the Court to individual liberties. Now, the tempting response might be that it's really about the Court

recognizing the proper role of the judiciary relative to the legislature. I think if you look at the behavior of these conservative justices on the Supreme Court, you see that as an explanation, it is frankly nonsense. These same conservative justices had absolutely no problem in striking down the D.C. ordinance prohibiting private possession ownership of handguns. There was no deference there to the legislature of 32-year-old ordinance. These same justices had no problem in striking down affirmative action programs, adopted by popularly elected legislatures and by state boards of regents. These same five conservative justices had no problem in striking down campaign finance laws, adopted by Congress, such as in *Citizens United v. Federal Elections Commission*. So, if it's really about deference to the legislature, where was it in regard to the area of gun control, affirmative, action or campaign finance? I think the only way to understand is that these justices are hostile to the individual liberties that are involved and that's what reflected in the cases that I've mentioned.

I think this isn't going to change for the foreseeable future. I was hopeful before November 8, 2016, that there would be, for the first time in my adult life, first time since I became a lawyer, five justices appointed by Democratic presidents.

But instead we saw something unprecedented in American history. Prior to 2016, 24 times in American history there was a vacancy in the Supreme Court during the last year of a president's last term. In 21 of 24, the Senate confirmed the nominee, in three instances, the Senate denied confirmation. Never before in history has the Senate said, "no hearings, no vote" on a presidential nomination to the U.S. Supreme Court. We're not going to have Merrick Garland replacing Antonin Scalia. Instead, we have Neil Gorsuch. And let there be no doubt that Neil Gorsuch is going to be a very conservative justice on the Court. In fact, I think he might be more conservative than the justice he replaced, Antonin Scalia. We tend to forget that there are areas where Justice Scalia joined with the more liberal justices. Justice Scalia was often a pro-free speech justice. For example, the two free speech cases that held that flag burning is constitutionally protected speech were 5-4 with Justice Scalia in the majority. In recent years, Justice Scalia wrote a number of dissents in Fourth Amendment cases, joined by Justices Ginsberg, Sotomayor, and Kagan, urging greater protection of privacy rights. It was Justice Scalia who lead the Court in expanding the rights of criminal defendants under the confrontation clause of the Sixth Amend in *Crawford v. Washington* and the rulings that followed it.

I can't identify any areas where Neil Gorsuch is likely to join with the more liberal justices. Neil Gorsuch was sworn in on April 6, 2017. Between then and June 26, the last day of the term, Neil Gorsuch voted together with Clarence Thomas 100% of the time. In fact, Neil Gorsuch and Clarence Thomas joined each other's opinions 100% of the time. To put this in some context, we usually thought of Justices Scalia and Thomas as ideologically similar. In their last year together on the Court, they agreed only 84% of the time. Neil Gorsuch is 49-years-old. If he stays on the Supreme Court until he is 90, the age John Paul Stevens retired, he will be on the bench 41 years. As I tell my students, this would mean that he would be on bench to the year 2058.

It seems likely that there will be another vacancy on the Supreme Court between now and January 20, 2021. Since 1960, 78-years-old is the average age at which Supreme Court justices have left the bench. As we are together today, there

are three justices who are 78 or older. Ruth Bader Ginsberg turned 84 on March 15, Anthony Kennedy turned 81 on July 23, Stephen Breyer turned 79 on August 15. If anyone of these three justices leave the bench between now and the end of the Trump presidency, it'll create the most conservative Court there's been since at least in the 1930s. I believe that Justices Ginsberg and Breyer will stay on the Court until the end of the Trump presidency if their health allows them to do so. Of course, we're talking about individuals who are 84, 81, and 79 years old. I have to believe that one or more will be replaced by President Trump and that then means that there will be conservative Court for the rest of my career, the rest of my lifetime, and those of you law students, for most of your career as well. So it seems to me, it's fanciful to think that there's going to be a Supreme Court to expand constitutional rights generally or find a right to physician aid in dying more specifically.

That brings me to my second point: We need to turn to state constitutions for the expansion of civil liberties and civil rights. This isn't a new idea. William Brennan published an article in the January 1977 Harvard Law Review, urging the use of state constitutions to advance liberty and equality. Justice Brennan had seen the shift in the Court, the end of the Warren Court and the beginning of the Burger Court era, and he realized that it was unlikely, given the justices that Richard Nixon had put on the Court that there'd be a bench to expand rights for the foreseeable future. Brennan, who'd been at the very center of the Warren era, said, "Let's look to state constitutions as the new source for expansion of rights."

There's much to be said for this approach. States always can provide more rights than the United States Constitution. A famous example of this in the First Amendment area was a Supreme Court case, *Pruneyard v. Robbins*. The United States Supreme Court had ruled that there's no First Amendment right to use privately owned shopping centers for speech purposes. But the California Supreme Court interpreting the California Constitution, found that there was a state constitutional right to use privately owned shopping centers for speech purposes. The Supreme Court, in an opinion by then-Justice William Rehnquist, said that states under their state constitutions can provide more protections of liberty. There are many areas across the country where state supreme courts have done this. For example, some states have provided more protections with regard to searches and seizures than the United States Supreme has found the Fourth Amendment. Some states have found more protection of individual autonomy than the United States Supreme Court has found under the "liberty" of the due process clauses.

Also there sometimes is a benefit of litigation in state court because of much more specific enumerations of rights in state constitutions than exists under the United States Constitution. For instance, the State of Montana has a dignity clause in its constitution, key to the ruling in *Baxter v. Stay*. A number of states, like California and Alaska, enumerate a right to privacy in their state constitutions. Many states enumerate a right to education in their state constitutions. Many states have provisions that create a right of redress, a right of access to the courts. All of these provisions provide a basis for litigation in state courts under state constitutional when the same litigation might not succeed in federal courts under the United States Constitution.

Also, there is the reality states can be laboratories for experimentation. States can be models for one another. The idea that state governments can be

laboratories for experimentation is nothing new. Justice Louis Brandeis articulated it early in the twentieth century. A state can find a right in its constitution that can influence other states and ultimately might even be found in the United States Constitution. That's of course exactly what happened with regard to marriage equality. In 1993, the Massachusetts Supreme Judicial Court became the first judicial body in this country to recognize a right to same-sex marriage, declaring a Massachusetts law that prohibited same-sex couples from marrying to violate the state constitution. A number of other states followed the lead of Massachusetts. Iowa and California, for example, also found state law prohibiting same-sex marriage to violate their state constitutions. Soon this led to litigation in federal court, and it culminated in *Obergefell v. Hodges*, where the Supreme Court held that there is a United States constitutional right for same-sex couples to marry. I remember after the decision of the Massachusetts Supreme Judicial Court in 2003 saying that I believed in my lifetime there would be a right of gay and lesbian couples to marry. But when I said that, I could never imagine that it would occur within just 12 years.

It would not have happened without state courts and state constitutions. I think once Massachusetts and other states recognized the right to same-sex marriage, the country could see there were no undesirable consequences. It was affirming of the right to marry and of the institution of marriage. This then very much influenced what the Supreme Court did.

But I must say that I have only two cheers, not three, for state constitutions. I think in some ways they are a second best. Some of it is the sheer inefficiency of protecting rights at the state level. There are 50 states, plus the District of Columbia, so there are 51 jurisdictions to litigate to create a right under state constitutions. It's much easier to get the United States Supreme Court to recognize a right for the whole country than to have to litigate state-by-state under each individual state constitution. Also the reality is, when it's done at the state level there will be successes and there will be failures. We tend to forget that there were some state highest courts that refused to recognize the right to marriage equality. The New York Court of Appeals, 4-2, said there was no right to same-sex marriage in New York and that the prohibition of marriage equality didn't offend the New York Constitution. When we settle for litigating in state courts because we can't win at the federal level, it means that in some parts of the country those rights will be protected, but not in others.

That then exacerbates inequalities on the basis of wealth. People with money can travel to the states where rights are protected; people who don't have the resources, can't. I believe that if President Trump can replace Justice Ginsberg, Justice Kennedy, or Justice Breyer, there will be five votes to overrule *Roe v. Wade*. Then, about half the states will prohibit all or almost all abortions. Women with resources will be able to travel to places like California or New York where abortion is safe, legal. Before New York was the first state in this country to legalize abortion over 40% of the abortions performed in England were performed on American women. It wasn't poor women who were traveling to England for abortions. Leaving things to state-by-state determinations means those with money will get the rights, those without won't, and that's really troubling.

Third, at least when it comes to a right to physician aid in dying, we've not been successful in terms of state courts and state constitutions. I mentioned to you that not much is different in the United States today compared to when my dad died

in March of 1993. There's been an occasional success. *Baxter v. State of Montana*, that was discussed in this symposium is a notable win. But more often there have been failures in trying to create a right to physician aid in death under state constitutions. We're here because of the decision of the New Mexico Supreme Court in *Morris v. Bradenburg*, which rejected such a right. Similarly, the New York Court of Appeals, in *Myers v. Schneiderman*, rejected a right to physician assistance in death under the New York Constitution.

Why is it then that has there not been more success under state constitutions? And what might this tell us more generally about litigating constitutional rights under state constitutions? In part, I think the lack of success reflects a general lack of tradition of strong state constitutionalism. I don't want to overstate this. I could point to many examples where state courts under state constitutions have protected more rights than under the United States Constitution. But I would say that overall we have in the United States a very weak tradition of using state constitutions to provide more protection for rights than the United States Constitution. What we see with regard with to the rejection of the right to physician assistance in death under state constitutions parallels many other failures to try to expand rights and liberties under state constitutional law.

In part this might be that in the majority of states, state judges find some form of electoral review. Forty-one states subject state court judges to some review at the polls. In some states, it's just judges running like other politicians in partisan elections. In some states, it's retention elections. In California, it's a mixture of judges running in nonpartisan contested elections for the trial court and retention elections at the appellate and supreme court level. I worry that electoral review makes it less likely that judges in those states will be courageous in finding rights and liberties, especially when they're controversial. Otto Kaus served with great distinction for many years on the California Supreme Court. He said that facing judicial retention elections is for a judge like having a crocodile in your bathtub. He said, you never forget that it's there. There's studies that have been done that compare the rate of affirmance and reversal in death penalty cases among state supreme courts where the justices face some form of electoral review compared to those where the justices don't. There is a dramatic difference where judges have to go before the voters, they are far less likely to overturn death sentences. Electoral review of judges clearly has an effect with regard to judicial behavior.

For example, as I mentioned earlier, the Iowa Supreme Court, after the Massachusetts Supreme Judicial Court, unanimously found a right to marriage equality for gays and lesbians under the Iowa state constitution. At the next election, three of the justices on a 5 member court, were up for retention. All three were denied reelection. I have to believe that judges across the country took note of this. It does have a debilitating effect in terms of the use of state constitutions.

I also worry when it comes to the use of state constitutions that the overhang of federal constitutional law has great sway. This is true as to the focus of this conference: a right to physician assistance in death. In rejecting a right under their state constitutions, both the New Mexico Supreme Court and the New York Court of Appeals cited to the United States Supreme Court's decision in *Washington v. Glucksberg*. In that case, the United States Supreme Court said that the challenge of the laws prohibiting physician assisted death only had to meet rational basis review.

Glucksberg should have been absolutely irrelevant to the New Mexico Supreme Court and the New York Court of Appeals. *Glucksberg* was entirely about how the United States Supreme Court interpreted the United States Constitution. As I said earlier, states always can provide more protection of rights under state constitutions. Even though there's no fundamental right to physician assisted death under the Due Process Clause or Equal Protection Clause of the Fourteenth Amendment, that doesn't mean that a state, under its state constitution, can't find such a fundamental right. The state, of course, is free to use heightened scrutiny even if the United States Supreme Court rejected it. But you only have to read the opinions in *Morris* and *Myers* to get a sense that the Supreme Court's determination had a real influence in the way those state highest courts looked at the issues. Thus, there's been very limited success under state constitutions with regard to the realm of this conference: autonomy with regard to medical decisions, especially in regard to physician assistance in death.

Fourth and finally, what do we do about it? What now? One possibility is to go to state legislatures or to use the initiative process to enact state laws protecting a right to physician assistance in death. This has been successful in a few places. In a couple of other states, the initiatives failed only by the slimmest of margins.

I applaud these efforts; I've worked in favor of these efforts. And yet also, I recognized the limitation of these efforts. To start with, I don't like the idea that what I regard and I think should be regarded as a fundamental right is being left to the political process. Long ago, the Supreme Court recognized that we put rights in the Constitution precisely to take them out of the usual political process. I believe that the Constitution and its guarantee of liberty protects basic autonomy for each of us. And that autonomy should include the ability to make the profoundly crucial decision whether to have death with dignity, whether to live or die, especially in the face of a terminal illness.

Also, successes in legislatures have been relatively rare. It is important to think about why it has been so hard to get these bills through legislatures. Why haven't more initiatives of the sort that have passed in a few states been adopted in others? I speculate, but I think some of it is the power of single issue lobbyists; intensity of preference has disproportionate weight in our political system. There is intense opposition to protecting a right to death with dignity. Often, the opposition is religiously based.

I think it's also been very difficult to rally widespread support for this legislation of these initiatives. I'm not a psychologist, so I really am speculating, but my guess here is that it's about how none of us really want to face our own mortality. We don't want to contemplate what it will be when we have to face terminal illness and excruciating pain. I'm a lawyer and a law professor; I've taught the *Cruzan* case every year since it came down in 1990 and until just a year ago, I didn't have a living will. Every time I taught the case, I said to my students, if I'm ever in the situation of Nancy Cruzan, I don't want to be kept alive in a persistent vegetative state. But then I didn't do anything about it. And if I didn't, then doesn't it help to explain why most people don't want to confront this issue? And then doesn't that help to explain why it's been so hard to get legislation passed? So, we have to work hard in order to get legislation passed because we may not succeed in states under state constitutions

and we are not going to succeed under the United States Constitution in the Supreme Court.

I think we need more generally to put much more emphasis and attention on state constitutions than ever before. I think law schools and law professors deserve a great deal of the blame. At least until this year, I have never taught at a law school that offered a course on state constitutional law. I now believe that we're wrong to not do so. If we are going to have lawyers litigating under state constitutions and judges adjudicating under them, then we need to be teaching law students about state constitutional law. If you look at law professors, relatively few of them are writing about state constitutional law. If you look at the most prominent of law professors in the country, you don't see them writing articles about state constitutional law. They'll write about the United States Supreme Court, but rarely turn their attention to litigating under state constitutions. Law schools need to change this, as state constitutions are going to be the source of rights for years to come.

As we go forward on the issue of physician assistance in death, we really need to engage in a public education campaign far better and more effective than ever before. The opponents of physician assistance in death point to the possibility of abuses, but we've now got data, including from the state of Oregon. We see how rare abuses are in this country, even where there's physician assisted death. We see that often people who get prescriptions that would allow assistance in death don't take them, but are comforted by their existence. We need to get all of this out and educate legislators and the public.

In April 2017, our 16-year-old dog, Nadia, needed to be put down. At that point, she was deaf and blind and regularly walking into walls. She was incontinent. It was difficult for her to stand as her back hips were giving out. We realized that the most compassionate thing would be to put her out of her suffering. We called a vet that came to our house and in the peace of our backyard, gave her a shot to end her life. And I realized when that happened that we treat our pets so much more humanely than we treat our loved ones. I was thinking about my father when all of this happened.

I realize that I have painted a fairly bleak picture about physician assisted death or more generally, the future of our constitutional rights. Yet, I realize then that we have only two choices when confronted with this reality. We can give up, or we can fight harder. And I think the reality that I described this afternoon means that if we care, we're going to have to fight harder, better and more effectively than ever before.