

THE VIRTUE OF JUDICIAL HUMILITY[†]

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INTRODUCTION^{†††}

Since the United States Supreme Court invalidated a portion of the Defense of Marriage Act in *United States v. Windsor*,¹ many lower courts have addressed the constitutional issues raised by state laws prohibiting same-sex couples from marrying.² Many lower courts have struck down such laws. The Supreme Court will consider the issue in the very near future.³ In considering 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*⁴ and *Vacco v. Quill*,⁵ 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; however, 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

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^{†††} This Article draws from several previously published articles of mine. See Richard S. Myers, *Reflections on the Terri Schindler-Schiavo Case*, 11 CATH. SOC. SCI. REV. 65 (2006); Richard S. Myers, *Physician-Assisted Suicide: A Current Legal Perspective*, 1 NAT'L CATH. BIOETHICS Q. 345 (2001); Richard S. Myers, *An Analysis of the Constitutionality of Laws Banning Assisted Suicide from the Perspective of Catholic Moral Teaching*, 72 U. DET. MERCY L. REV. 771 (1995). To avoid multiplying footnotes, I will not always indicate when I have drawn from these articles.

1. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

2. See *Marriage Rulings in the Court*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/marriages-rulings-in-the-courts> (last updated Jan. 27, 2015).

3. See, e.g., *Deboer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), cert. granted, 135 S. Ct. 1040 (2015).

4. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

5. *Vacco v. Quill*, 521 U.S. 793 (1997).

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.

I. ASSISTED SUICIDE AND THE COURTS

In thinking about the constitutional issues raised by state prohibitions of same-sex marriage, I focus first 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*.⁶ In *Casey*, the joint opinion infamously declared that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."⁷ This passage has been read—with some justification—as supporting the idea that moral relativism is a constitutional command.⁸ In the mid-1990s, some lower courts cited this expansive language in *Casey* in support of a fundamental right to assisted suicide.⁹ 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.¹⁰ According to this view, "[t]he right to die with dignity accords with the American values of self-determination and privacy regarding personal decisions."¹¹ 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,¹² and although it is a bit simplistic to view things this way, I think Judge

6. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

7. *Id.* at 851.

8. Steven G. Gey, *Is Moral Relativism a Constitutional Command?*, 70 IND. L.J. 331, 362–63 (1995).

9. See Richard S. Myers, *An Analysis of the Constitutionality of Laws Banning Assisted Suicide from the Perspective of Catholic Moral Teaching*, 72 U. DET. MERCY L. REV. 771, 778–79 (1995) (discussing these cases).

10. *Compassion in Dying v. Wash.*, 850 F. Supp. 1454, 1459–60 (W.D. Wash. 1994).

11. *Compassion in Dying v. Wash.*, 49 F.3d 586, 589, 596 (9th Cir. 1995) (Wright, J., dissenting).

12. *Compassion in Dying v. Wash.*, 79 F.3d 790, 793 (9th Cir. 1996) (en banc) (Reinhardt, J.).

Reinhardt's views are a good barometer of the views of the more liberal judges and of the legal academy.¹³

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:

[W]e 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.¹⁴

In *Glucksberg*, unlike in *Roe v. Wade*¹⁵ or in *United States v. Windsor*,¹⁶ the Court was unwilling to take that step.

Glucksberg and *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 chiefly 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."¹⁷ 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 suicide¹⁸ and undermined the moral case in favor

13. See Gavin Broady, *The Lion in Winter: Judge Stephen Reinhardt*, LAW360.COM (Apr. 1, 2014), <http://www.law360.com/articles/523190/the-lion-in-winter-judge-stephen-reinhardt>.

14. *Washington v. Gluckberg*, 521 U.S. 702, 723 (1997).

15. *Roe v. Wade*, 410 U.S. 113 (1973). See Richard S. Myers, *Re-reading Roe v. Wade*, 71 WASH. & LEE L. REV. 1025 (2014) (recent comment on *Roe v. Wade*).

16. *Windsor*, 133 S. Ct. 2675.

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

18. Michael McConnell commented, "[T]he Court made a significant contribution to stopping what had appeared to be an ideological juggernaut . . ." Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 702 (1997).

of assisted suicide.¹⁹ In addition, the 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.²⁰

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;²¹ similar laws have been adopted in Washington²² and Vermont.²³ Court decisions in Montana²⁴ and New Mexico²⁵ have also opened the door to physician-assisted suicide in those states. The New Mexico court decision from January 2014 is on appeal.²⁶ Other recent efforts to legalize assisted suicide in Massachusetts, Connecticut, and New Hampshire have not met with success.²⁷

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

19. See Yale Kamisar, *On the Meaning and Impact of the Physician-assisted Suicide Cases*, 82 MINN. L. REV. 895, 900–01 (1998).

20. See *Sampson v. Alaska*, 31 P. 2d 88, 94, 99–100 (Alaska 2001); *Krischer v. McIver*, 697 So. 2d 97, 100 (Fla. 1997). See also Richard S. Myers, *Physician-assisted Suicide and Euthanasia: A Current Legal Perspective*, in LIFE & LEARNING XI: PROCEEDINGS OF THE ELEVENTH UNIV. FACULTY FOR LIFE CONFERENCE 3, 9 (Joseph W. Koterski ed., 2002) (brief discussion of these cases).

21. See generally *Death with Dignity Act*, OR. HEALTH ADVISORY, <http://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Pages/index.aspx> (page containing additional information and reports) (last visited April, 2015).

22. See generally *Death with Dignity Act*, WASH. STATE DEP'T OF HEALTH, <http://www.doh.wa.gov/YouandYourFamily/IllnessandDisease/DeathwithDignityAct> (page containing additional information and reports)(last visited April, 2015).

23. See generally *Patient Choice and Control at End of Life*, VT. DEP'T OF HEALTH, http://healthvermont.gov/family/end_of_life_care/patient_choice.aspx (page containing additional information).

24. *Baxter v. State*, 224 P.3d 1211, 1222 (Mont. 2009) (last visited April, 2015).

25. *Morris v. Brandenburg*, No. D-202-CV 2012-02909, 2014 BL 330927, at *1 (N.M. Dist. Ct. Jan. 13, 2014).

26. See Alex Schadenberg, *New Mexico Attorney General Appeals Court Ruling to Legalize Assisted Suicide*, LIFENEWS.COM (Mar. 12, 2014, 3:07 PM), <http://www.lifenews.com/2014/03/12/new-mexico-attorney-general-appeals-court-ruling-to-legalize-assisted-suicide/>.

27. See Steven Ertelt, *Massachusetts Fails to Become Third to Legalize Assisted Suicide*, LIFENEWS.COM (Nov. 7, 2012, 11:52 AM), <http://www.lifenews.com/2012/11/07/massachusetts-fails-to-become-third-to-legalize-assisted-suicide/>; Alex Schadenberg, *New Hampshire Bill to Legalize Assisted Suicide Overwhelmingly Defeated*, LIFENEWS.COM (Mar. 7, 2014, 10:59 AM), <http://www.lifenews.com/2014/03/07/new-hampshire-bill-to-legalize-assisted-suicide-overwhelmingly-defeated/>; Peter Wolfgang, *Connecticut Bill to Legalize Assisted Suicide Defeated in Committee*, LIFENEWS.COM (Mar. 28, 2014, 2:57 PM), <http://www.lifenews.com/2014/03/28/connecticut-bill-to-legalize-assisted-suicide-defeated-in-committee/>.

success either in legislative arenas or in influencing public opinion.²⁸ The situation would be vastly different if *Glucksberg* and *Quill* had come out the other way.

II. ABORTION AND SAME-SEX MARRIAGE AND THE COURTS

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.²⁹ This, of course, did not “resolve” the abortion controversy, as the *Casey* joint opinion claimed,³⁰ 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,³¹ are wildly out of line with the views of most Americans.³²

28. Public support for assisted dying “rose steadily for four decades but has remained roughly stable since the mid-1990s.” Erik Eckholm, ‘Aid in Dying’ Movement Takes Hold in Some States, N.Y. TIMES (Feb. 7, 2014), http://www.nytimes.com/2014/02/08/us/easing-terminal-patients-path-to-death-legally.html?_r=0.

29. *Roe v. Wade*, 410 U.S. 113, 166 (1973).

30. The joint opinion in *Casey* stated: “Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry.” *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 866–67 (1992). Justice Scalia offered the following comment to the joint opinion’s assessment:

Not only did *Roe* not, as the Court suggests, *resolve* the deeply divisive issue of abortion; it did more than anything else to nourish it, by elevating it to the national level where it is infinitely more difficult to resolve. National politics were not plagued by abortion protests, national abortion lobbying, or abortion marches on Congress before *Roe v. Wade* was decided. Profound disagreement existed among our citizens over the issue—as it does over other issues, such as the death penalty—but that disagreement was being worked out at the state level. As with many other issues, the division of sentiment within each State was not as closely balanced as it was among the population of the Nation as a whole, meaning not only that more people would be satisfied with the results of state-by-state resolution, but also that those results would be more stable. Pre-*Roe*, moreover, political compromise was possible.

Roe’s mandate for abortion on demand destroyed the compromises of the past, rendered compromise impossible for the future, and required the entire issue to be resolved uniformly, at the national level.

Id. at 995 (emphasis in the original) (Scalia, J., concurring in part, dissenting in part).

31. See Richard S. Myers, *The Supreme Court and Abortion: The Implications of Gonzales v. Carhart* (2007), in LIFE & LEARNING XVII: THE PROCEEDINGS OF THE SEVENTEENTH UNIV. FACULTY FOR LIFE CONFERENCE 103, 106–07 (Joseph W. Koterski ed., 2008) (discussion of the Court’s cases dealing with abortion).

32. See *Re-reading Roe v. Wade*, *supra* note 15, at 1040–41 (discussing *Roe v. Wade* and public opinion). In his recent book on *Roe v. Wade*, Clarke Forsythe summarized the point in this fashion: “What makes abortion uniquely controversial is that the Justices have sided with a small sect—7 percent of Americans—who support abortion for any reason at any time. And the Justices have for forty years

Moreover, the Court's decisions have, in the view of many, increased the discord. 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.³³

The Court's 2013 decision in *United States v. Windsor* is also instructive.³⁴ In *Windsor*, the Court held unconstitutional section 3 of the Defense of Marriage Act (DOMA), which defined "marriage" and "spouse" for purposes of federal law.³⁵ The *Windsor* Court seemed keen to avoid a sweeping ruling,³⁶ but the Court strongly influenced the subsequent debate in a way that a deferential ruling upholding DOMA would not have done. Justice Scalia seems to have accurately predicted that the Court had effectively decided the constitutionality of state laws limiting marriage to heterosexual couples.³⁷

III. BENEFITS TO JUDICIAL HUMILITY

In *Roe v. Wade* and *Windsor*, the Court intervened on abortion and same-sex marriage and issued rulings that significantly influenced the democratic debate on these issues. In contrast, with its decisions in *Glucksberg* and *Quill*, the Court left the issue of assisted suicide largely to the democratic process. The debate has continued without the distorting effect of the

prevented the 60–70 percent of Americans in the middle from deciding differently. That conflict between public opinion and the Supreme Court's nationwide policy is one key reason why *Roe* is uniquely controversial." CLARKE D. FORSYTHE, ABUSE OF DISCRETION: THE INSIDE STORY OF *ROE V. WADE* 295 (2013).

33. *Casey*, 505 U.S. at 1002 (Scalia, J., dissenting).

34. See Richard S. Myers, *The Implications of Justice Kennedy's Opinion in United States v. Windsor*, 6 ELON L. REV. 323 (2014) (brief discussion of *Windsor* and Justice Kennedy's opinion).

35. *Id.* at 324.

36. Professor Reva Siegel commented that the *Windsor* opinion was "plainly designed to influence, without deciding, deliberations about the constitutionality of state laws that restrict same-sex unions." Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 77 (2013).

37. *United States v. Windsor*, 133 S. Ct. 2675, 2709–11 (2013) (Scalia, J., dissenting) (explaining how the Court's opinion foreshadows the eventual conclusion that the Court will impose a constitutional requirement that states must give formal recognition to same-sex marriage).

Supreme Court's intervention.³⁸ 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."³⁹

Furthermore, we see the benefits to the Court's exercise of judicial humility. Because the Court did not dictate one national solution, we see 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. This is done all the time. Advocates on both sides frequently cite the Oregon experience (the state where assisted suicide has been legal for the longest period of time)⁴⁰ or the experiences in the Netherlands or Belgium.⁴¹ 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.⁴² His re-evaluation was prompted by the experiences 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."⁴³ He notes that "some slopes truly are slippery" and that "once the genie is out of the bottle, it is not likely ever to go back in again."⁴⁴

38. In contrast, Justice Scalia commented that the effect of the Court's *Windsor* decision "will be a judicial distortion of our society's debate over marriage—a debate that can seem in need of our clumsy 'help' only to a member of this institution." *Id.* at 2710 (Scalia, J., dissenting).

39. *Id.* at 2709 (Scalia, J., dissenting).

40. Compare Rita L. Marker, "Oregon Plus One" Equals Fifty?, HUMANLIFEREVIEW.COM (JULY 24, 2008), <http://www.humanlifereview.com/oregon-plus-oneq-equals-fifty/> (a lengthy discussion of the experience in Oregon written by an opponent of assisted suicide), with David Orentlicher, *Aging Populations and Physician Aid in Dying: The Evolution of State Government Policy*, 48 IND. L. REV. 111, 119 (2014) (relying on the Oregon experience to support the idea that safeguards against abuses are working).

41. For example, the Anscombe Bioethics Centre hosted a conference on November 1, 2014 to learn from Belgium's experience with assisted suicide and euthanasia. The Centre published a report on the conference. See ANSCOMBE BIOETHICS CENTRE, EUTHANASIA AND ASSISTED SUICIDE: LESSONS FROM BELGIUM (2014).

42. Steve Doughty, *Don't Make Our Mistake: As Assisted Suicide Bill Goes to Lords, Dutch Watchdog Who Once Backed Euthanasia Warns UK of 'Slippery Slope' to Mass Deaths*, DAILYMAIL.COM (July 10, 2014, 3:44 AM), <http://www.dailymail.co.uk/news/article-2686711/Dont-make-mistake-As-assisted-suicide-bill-goes-Lords-Dutch-regulator-backed-euthanasia-warns-Britain-leads-mass-killing.html>.

43. *Id.*

44. *Id.*

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.⁴⁵ 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 also seen democracy in action on the issue of same-sex marriage; however, 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*⁴⁶—did not preempt the democratic debate. So, in the mid-1990s, we saw Congress address the issue—in DOMA⁴⁷—and then the states.⁴⁸ 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 Supreme Court

45. For example, Judge Reinhardt did not place any significant weight on the state interest in avoiding undue influence and other forms of abuse because he concluded that “the process itself can be carefully regulated and rigorous safeguards adopted.” *Compassion in Dying v. Washington*, 79 F.3d 790, 837 (9th Cir. 1996). *But see* John Keown, *A Right to Voluntary Euthanasia? Confusion in Canada in Carter*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1 (2014). Professor Keown's article contains an extensive discussion of the empirical evidence in jurisdictions that have legalized euthanasia and concludes that

[t]he experience of the Netherlands and Belgium discloses widespread breach of key guidelines, with virtual impunity, not least the frequent practice of non-voluntary euthanasia. [Moreover, t]he safeguards in Oregon are in significant respects even laxer, and Oregon awaits the sort of comprehensive surveys carried out by the Dutch, surveys which have exposed the persistent failure of their guidelines to cabin voluntary euthanasia.

Id. at 43 (alteration in original).

46. *Baker v. Nelson*, 409 U.S. 810 (1972) (dismissing appeal of Minnesota Supreme Court decision, *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), which rejected constitutional challenges to the traditional definition of marriage).

47. Defense of Marriage Act, Pub. L. No. 104-99, 110 Stat. 2419 (1996). DOMA was passed overwhelmingly and signed by President Clinton. *See United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (Roberts, C.J., dissenting).

48. *See History of State Constitutional Marriage Bans: How North Carolina's Amendment 1 Fits in the Larger Picture*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/state-constitutional-marriage-bans> (last visited Apr. 4, 2015) (summary of state laws banning same-sex marriage); *History and Timeline of the Freedom to Marry in the United States*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/history-and-timeline-of-marriage> (last updated Jan., 2015) (history and timelines of developments in this area).

imposing a national solution to the issue through a creative interpretation of the Constitution. The debate was far more localized.

In *Windsor*, the Court did not 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,⁴⁹ 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."⁵⁰ The judicial decisions have been long on rhetoric and short on convincing discussions of legal doctrine. I suspect this is largely due to the baneful influence of Justice Kennedy's example in *Windsor*, which was "doctrinally obscure"⁵¹ and also filled with name-calling⁵²—an example of "The Jurisprudence of Denigration,"⁵³ as Steve Smith has noted. In addition, the judicial opinions' treatment of social science evidence has been less than inspiring.⁵⁴ I think

49. Since *Windsor*, all of the legalization of same-sex marriage has taken place through the courts (with the exception of Hawaii and Illinois). See *History and Timeline of the Freedom to Marry in the United States*, *supra* note 48.

50. *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910, 925 (E.D. La. 2014).

51. See Colin Starger, *The Virtue of Obscurity*, 59 VILL. L. REV. TOLLE LEGE 17, 17 (2013) (noting the "common frustration—expressed by supporters and opponents of same-sex marriage alike—at what may be called Kennedy's 'doctrinal obscurity'").

52. See Michael W. McConnell, *2013 Supreme Court Roundup: Telling A Tale of Two Courts*, FIRST THINGS (Oct. 2013), <http://www.firstthings.com/article/2013/10/2013-supreme-court-roundup> ("Yet the Court did not trouble to engage with the rationales offered by the supporters of DOMA either in the legislative history, the national debate, or the briefs. It simply dismissed contrary views as hateful. This is not constitutional analysis; it is adjudication by name-calling.")

53. Steven D. Smith, *The Jurisprudence of Denigration*, 48 U.C. DAVIS L. REV. 675 (2014). In this article, Professor Smith comments that "Kennedy's accusation can best be understood . . . as one salient symptom of (and, unfortunately, contribution to) a debased and divisive constitutional and moral discourse. Precisely contrary to its irenic and inclusivist intentions, by maintaining and contributing to that destructive discourse, the Supreme Court aggravates the conflict that is often described, with increasing accuracy, as the 'culture wars.'" *Id.* at 677. See also Lynn D. Wardle, "Sticks and Stones": *Windsor*, the New Morality, and Its Old Language, 6 ELON L. REV. 411, 419–24 (2014) (contending that the use of disrespectful, pejorative language in Justice Kennedy's *Windsor* opinion was inappropriate).

54. For example, in *Kitchen v. Herbert*, the Tenth Circuit opined, "[I]t is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples." *Kitchen v. Herbert*, 755 F.3d 1193, 1223 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014). See also Brief for 76 Scholars of Marriage as Amici Curiae Supporting Review and Affirmance, *DeBoer v. Snyder*, (Nos. 14-556, 14-562, 14-571, 14-574, & 14-596). There are, however, sound reasons for accepting the view that changing the definition of marriage will have impacts on marriage more generally. See *id.* See also Dale O'Leary, *In the Michigan Marriage Case, Which Side Is 'Unbelievable'?*, NAT'L CATHOLIC REGISTER (Apr. 4, 2014), <http://www.ncregister.com/daily-news/in-the-michigan-marriage-case-which-side-is-unbelievable/?nomobile=1> (another brief discussion of a court's poor treatment of social science evidence).

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,⁵⁵ and Judge Walker's opinion in *Perry v. Schwarzenegger*,⁵⁶ which was criticized on these same grounds by Justice Alito's dissent in *Windsor*.⁵⁷

There is a temptation for all of us, I think, to try to predict social trends. 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; however, that's not what has happened.⁵⁸ There is increasing pro-life sentiment, and this is particularly apparent among young people.⁵⁹ 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,⁶⁰ 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.⁶¹ Questions have been raised, however, about the validity of these polls for some time now,⁶² and the recent Pew poll

55. See *Compassion in Dying v. Washington*, 79 F.3d 790, 793–839 (9th Cir. 1996).

56. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

57. *United States v. Windsor*, 133 S. Ct. 2675, 2718–19 (2013) (Alito, J., dissenting).

58. As Clarke Forsythe has noted, “The conventional wisdom is that the Court ‘led public opinion’ in 1973—that the country was moving inescapably toward legalizing abortion, and that the Court was just ahead of public opinion.” FORSYTHE, *supra* note 32, at 290. That was not, as Forsythe demonstrates, an accurate reading of the situation. *Id.* at 289–309.

59. Gallup polls show pro-life sentiment is greater now than when compared to the 1990s. See *Abortion*, GALLUP POL., <http://www.gallup.com/poll/1576/abortion.aspx> (last visited Apr. 4, 2015). This increase in pro-life sentiment is also true when considering the views of young people. See Michael New, *Women and Young Adults More Likely to Support 20 Week Abortion Ban*, NAT'L REV. ONLINE (July 2, 2013, 3:05 PM), <http://www.nationalreview.com/corner/352597/women-and-young-adults-more-likely-support-20-week-abortion-ban-michael-new>.

60. See Richard S. Myers, *An Analysis of the Constitutionality of Laws Banning Assisted Suicide from the Perspective of Catholic Moral Teaching*, 72 U. DET. MERCY L. REV. 771, 782–86 (1995); Richard S. Myers, *Pope John Paul II, Freedom, and Constitutional Law*, 6 AVE MARIA L. REV. 61, 80 (2007).

61. “There's no doubt where history is going on this issue. Look at the dozen countries around the world that in the last decade—that now allow marriage equality, even predominantly Catholic countries that allow marriage equality. Look at the trend—the accelerating trend in the United States. These five Justices want to be on the right side of history, and there's no doubt where history is going on this issue.” Erwin Chemerinsky, *Law Review Symposium 2014—Keynote by Erwin Chemerinsky*, 48 U.C. DAVIS L. REV. 447, 456 (2014).

62. See Rich Morin, *Study: Opposition to Same-sex Marriage May Be Understated in Public Opinion Polls*, PEW RESEARCH CENTER (Sept. 30, 2013), <http://www.pewresearch.org/fact-tank/2013>

shows a drop in support for same-sex marriage.⁶³ 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; however, the change likely would have been slower and more deliberate and, over a period of time, better informed (much as we've seen after *Washington v. Glucksberg*). This would have taken place without the distorting impact of the Court's "help."⁶⁴

CONCLUSION

The Court will have a chance to address the issue of same-sex marriage 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.⁶⁵ 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,

[N]o 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]

/09/30/opposition-to-same-sex-marriage-may-be-understated-in-public-opinion-polls/; Frank Schubert, *Polling on Marriage: The American People Continue to Support Preserving Marriage as the Union of One*, WASH. TIMES (June 18, 2014), <http://www.washingtontimes.com/news/2014/jun/18/polling-on-marriage-the-american-people-continue/?page=all>.

63. Dustin Siggins, *Pew Poll Shows Drop in Support for Same-sex 'Marriage': New Trend or Blip?*, LIFESITENEWS.COM (Sept. 24, 2014, 11:48 AM), <https://www.lifesitenews.com/news/pew-poll-shows-drop-in-support-for-same-sex-marriage-new-trend-or-a-blip>.

64. Judge Sutton's comment in *DeBoer v. Snyder* captures this view: "When the courts do not let the people resolve new social issues like this one, they perpetuate the idea that the heroes in these change events are judges and lawyers. Better in this instance, we think, to allow change through the customary political processes, in which the people, gay and straight alike, become the heroes in their own stories by meeting each other not as adversaries in a court system but as fellow citizens seeking to resolve a new social issue in a fair-minded way." *DeBoer v. Snyder*, 772 F.3d 388, 420 (6th Cir. 2014), *cert. granted*, 135 S. Ct. 1040 (2015).

65. When faced with these constitutional issues, some judges have appealed to humility. See *United States v. Windsor*, 133 S. Ct. 2675, 2715 (2013) (Alito, J., dissenting) ("Faced with such a request [for the recognition of a new right to same-sex marriage], judges have cause for both caution and humility.") (alteration in original); *DeBoer*, 772 F.3d at 404 ("A dose of humility makes us hesitant to condemn as unconstitutionally irrational a view of marriage shared not long ago by every society in the world, shared by most, if not all, of our ancestors, and shared still today by a significant number of the States.").

is in the quite opposite and more natural direction—towards systematically eliminating checks upon its own power⁶⁶

Justice Scalia observed that the Court “succumb[ed]”⁶⁷ 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.⁶⁸

66. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 981 (1992) (Scalia, J., dissenting) (alteration in original).

67. *Id.* (Scalia, J., dissenting).

68. *See Chemerinsky, supra* note 61, at 8.