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Michael P. Allen

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INTRODUCTION

There will be much written about Justice Sandra Day O'Connor and her legacy. If nothing else, after all, she was the first woman ever to serve on the United States Supreme Court. But there is far more to Justice O'Connor's place in the American legal landscape. She was a pivotal swing vote on a highly-divided Court. As such, her views were often critical to the development of the law over the past two decades.1 And let us not forget that she was one of the five votes that effectively decided the 2000 presidential election.2 There simply is no denying that Justice O'Connor will be remembered as a major figure in American law whether one praises or despises her jurisprudence.3

The popular press has already begun to review and assess the impact Justice O'Connor made in a number of substantive areas of law. Most frequently mentioned among these areas are affirmative action, abortion, the First Amendment's

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* Associate Professor of Law, Stetson University College of Law; B.A., 1989, University of Rochester; J.D., 1992, Columbia University School of Law. I am grateful to my colleague Becky Morgan for her comments and her support. Thanks also to the staff of the Stetson Faculty Support Office for their work on this Essay. Finally, I express my gratitude to the staff of the William and Mary Bill of Rights Journal for the work done on this Essay.

1 For example, "[o]ver the past decade . . . [Justice O'Connor] voted with the majority in more than three-fourths of court rulings that were decided 5-4." Michael D. Lemonick & Viveca Novak, The Power Broker, TIME, July 11, 2005, at 31 (citing a study conducted by Washington law firm Goldstein & Howe).


3 Opinion has been divided in early assessments of Justice O'Connor's time on the bench. For example, one commentator has asserted that Justice O'Connor "was at the Court to render her absolutely best judgement case-by-case. And that is what she has done." Marci Hamilton, The Remarkable Legacy of Justice Sandra Day O'Connor, WRIT, July 14, 2005, http://writt.corporate.findlaw.com/hamilton/20050714.html. Other commentary has been less favorable. See, e.g., Peter S. Canellos, With a Politician's Eye, O'Connor Led the Way, BOSTON GLOBE, July 12, 2005, at A3 ("Her ability to coax her fellow justices into endorsing her views exceeded her ability to craft the kind of legal doctrines that would ensure that those views endured after her retirement."). And then there are those who are affirmatively quite happy to see her retire. See, e.g., Charles Lane, In the Center, Hers Was the Vote that Counted, WASH. POST, July 2, 2005, at A1 (quoting a conservative activist as saying: "'We have a living Constitution. Her name is Sandra Day O'Connor, and thank God she's retiring.'").
Establishment Clause, and federalism. I agree that Justice O’Connor has been an important voice in these areas and that her replacement could affect the dialogue on these significant questions over the years to come. But there are important parts of Justice O’Connor’s jurisprudence that are receiving scant attention.

This Essay seeks to fill one significant gap in the developing analysis of Justice O’Connor’s legacy. My focus is on her important contributions concerning the role the United States Constitution plays in end-of-life decisionmaking. All of the Court’s decisions in this area came during Justice O’Connor’s tenure. In each of them, she wrote a concurring opinion that took a position different from the majority’s reasoning in important respects. And in each case, O’Connor’s concurrence was more protective of federal constitutional rights concerning personal decisions about the time and manner of one’s death. The first goal of this Essay is to describe the important role Justice O’Connor has played in this area of law.

I also explore how the O’Connor legacy in the area of death and dying may accurately be characterized as one of constitutional promises unfulfilled. In her important concurring opinions, Justice O’Connor left no doubt that, in her view, the Constitution most certainly spoke to certain end-of-life matters. For example, she wrote about the place in constitutional jurisprudence of palliative care and of the recognition of the right of surrogate decisionmaking. These positions served as

4 See, e.g., Linda Greenhouse, Consistently, a Pivotal Role, N.Y. Times, July 2, 2005, at A1; Lane, supra note 3; see also Hamilton, supra note 3.
5 See, e.g., Grutter v. Bollinger, 539 U.S. 306 (2003) (Justice O’Connor authored majority opinion upholding the affirmative action admission program at the University of Michigan Law School); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (Justice O’Connor co-authored the principal opinion developing the “undue burden” test for evaluating restrictions on the right to have a pre-viability abortion); New York v. United States, 505 U.S. 144 (1992) (Justice O’Connor wrote the majority opinion striking down a federal statute on the ground that it commandeered a state legislature in contravention of the Tenth Amendment); Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (Justice O’Connor wrote a concurring opinion in an Establishment Clause case in which she articulated an “endorsement test” as a key component of constitutional adjudication in this area).
6 There has been almost no discussion of this aspect of Justice O’Connor’s jurisprudence. For instance, a blog devoted to following the Supreme Court published a six-part analysis of Justice O’Connor’s positions on important legal issues. See Posting of Anisha Dasgupta to The Supreme Court Nomination Blog, http://www.sctnomination.com/blog/archives/2005/07/justice_oconnor.htm (July 2, 2005, 17:29 EST). There is no mention of the right to die cases in this comprehensive discussion. A rare exception was an article in Time Magazine concerning the issues on which Justice O’Connor has had an impact. Daniel Eisenberg, What’s at Stake in the Fight, TIME, July 11, 2005, at 28–29.
8 I discuss Justice O’Connor’s positions in greater depth below. See infra Part I.
9 For the former proposition, see Glucksberg, 521 U.S. at 736–38 (O’Connor, J., concurring), and for the latter, see Cruzan, 497 U.S. at 287–92 (O’Connor, J., concurring).
important caveats on the much more laissez-faire attitude of the majority. But these tantalizing promises of constitutional protections remain unfulfilled as Justice O’Connor leaves the bench. This is so even though the Court has had occasions over the years to speak more clearly on these issues. What is more, this failure to follow through on O’Connor’s views has had, and will continue to have, real world consequences. One can see these consequences in such things as the saga surrounding Terri Schiavo and the case recently decided by the Supreme Court on January 17, 2006, concerning Oregon’s Death with Dignity Act. Thus, with Justice O’Connor’s retirement and the consequent loss of her moderating voice on these matters, there is a distinct danger that the unfulfilled constitutional promises may become broken ones.

This Essay is in three parts. Part I discusses the Supreme Court’s constitutional jurisprudence in death and dying matters with a particular focus on Justice O’Connor’s views. My aim is not to provide a comprehensive consideration of these weighty issues. Rather, the more modest goal of this Part is to describe the constitutional landscape and illustrate how much Justice O’Connor has had to do with its construction. Part II explores how the promises of greater constitutional protection for end-of-life rights remain unfulfilled. It also describes the practical consequences of that state of affairs. Finally, Part III briefly considers the uncertain future of constitutional protection for the “right to die” in a Court without Justice O’Connor.

I. THE SUPREME COURT, THE “RIGHT TO DIE,” AND JUSTICE O’CONNOR

The Supreme Court has squarely faced issues concerning the constitutional status of a “right to die” only three times. The first of those cases concerned the

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10 I discuss both of these issues, as well as other examples of the impact of the Court’s equivocal position concerning end-of-life matters, below. See infra Part II.

11 One initial difficulty in discussing any end-of-life matter is terminology. See generally ALAN MEISEL & KATHY L. CERMINARA, THE RIGHT TO DIE: THE LAW OF END-OF-LIFE DECISIONMAKING § 1.01 (3d ed. Supp. 2005) (discussing the difficulties associated with the term “right to die” and other ways of referring to matters concerning death and dying). The fundamental problem is that the ways in which we face death and how the “law” affects those situations are remarkably varied. Indeed, Justice O’Connor alluded to this very idea when she began one of her important concurring opinions in this area by noting: “Death will be different for each of us.” Glucksberg, 521 U.S. at 736 (O’Connor, J., concurring). Thus, the “right to die” can conjure up images of everything from affirmative actions such as euthanasia and physician-assisted suicide on the one hand to more passive activities such as the removal of life-sustaining medical treatment on the other. These distinctions may or may not be real, and they may or may not be outcome determinative in some contexts if they in fact exist. However, they are not particularly critical for purposes of this Essay. This Essay is designed to canvas Justice O’Connor’s impact on death and dying in a broad way. Accordingly, I use the term “right to die” to capture the issues in the most comprehensive way possible.
claimed right to refuse medical treatment while the other two dealt with the asserted right to have a physician assist one in ending life. While these two situations are really simply variants of the broader "right to die," the Court has treated them as being entirely distinct. This Essay employs the Court's approach purely for organizational purposes. In the balance of this Part, I provide a summary of the Court's end-of-life decisions with a focus on Justice O'Connor's important contributions.

A. Cruzan: The Right to Refuse Medical Treatment

The first true end-of-life case to reach the Court was its 1990 decision in Cruzan v. Director, Missouri Department of Health. While certainly a landmark decision in many respects, the issue in Cruzan was actually quite narrow. The State of Missouri required clear and convincing evidence of a person's intent to refuse medical treatment in order to support the refusal of such treatment. Nancy Cruzan was in a persistent vegetative state with her body being kept alive by the artificial provision of nutrition and hydration through a feeding tube. Ms. Cruzan's parents sought permission to remove the feeding tube, claiming that their daughter would not have wished to be kept alive in her condition. A state trial court agreed, but the Missouri Supreme Court reversed. The state Supreme Court held that the evidence in the record did not meet the clear and convincing standard required under Missouri law. Ms. Cruzan's parents appealed to the United States Supreme Court arguing that Missouri's evidentiary requirement violated their daughter's constitutional right to due process of law.

Chief Justice Rehnquist delivered the opinion of the Court in which he rejected the parents' argument. Importantly for present purposes, he only assumed that the Constitution provided protection for a competent person's right to refuse medical treatment (including the provision of nutrition and hydration). He also only assumed

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12 *See, e.g.*, Vacco, 521 U.S. at 801-09 (articulating the view that affirmative action, such as physician assistance, in ending a life are distinct from the omission of medical treatment).


14 *Id.* at 267-69.

15 *Id.* at 266.

16 *Id.* at 267-68.

17 *Id.* at 268.

18 *Id.* at 268-69.

19 *Id.* at 269.


21 Cruzan, 497 U.S. at 279 ("[F]or purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.").
that such protection extended to incompetent as well as competent persons.\textsuperscript{22} After setting out these assumptions, he ultimately concluded on behalf of the Court that Missouri’s evidentiary policy did not sufficiently undermine the assumed rights when balanced against the significant state interests implicated.\textsuperscript{23}

Justice O’Connor provided the fifth vote for the Chief Justice’s opinion. However, she also wrote a concurring opinion that was far more receptive to end-of-life rights than that of the majority in two important respects.\textsuperscript{24} First, unlike Chief Justice Rehnquist, Justice O’Connor was not equivocal about the constitutionally-protected status of a right to refuse medical treatment. Far from merely assuming that the right was protected as a matter of due process, Justice O’Connor explained in detail why such a right is part of due process.\textsuperscript{25} She concluded this portion of her opinion by stating without qualification that “the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual’s deeply personal decision to reject medical treatment, including the artificial delivery of food and water.”\textsuperscript{26} Needless to say, such an acknowledgment was incredibly significant coming from a member of the majority. But it did not have the force of law. At this point, Justice O’Connor’s concurrence was a tantalizing vision of what could be; to many it no doubt had the nature of a constitutional promise that would — or at least might — come to be.\textsuperscript{27}

\textsuperscript{22} Id. at 279–80.
\textsuperscript{23} Id. at 280–87.
\textsuperscript{25} \textit{Cruzan}, 497 U.S. at 287–89 (O’Connor, J., concurring). To be sure, Justice O’Connor did not provide many details about the right she posited. See, e.g., John A. Robertson, \textit{Cruzan and the Constitutional Status of Nontreatment Decisions for Incompetent Patients}, 25 GA. L. REV. 1139, 1173 (1991) (discussing the significant issues left open in Justice O’Connor’s \textit{Cruzan} position). But the lack of details should not detract from the import of the concurrence.
\textsuperscript{26} \textit{Cruzan}, 497 U.S. at 289 (O’Connor, J., concurring).
\textsuperscript{27} One might argue that O’Connor’s statement should be regarded as the essential holding of \textit{Cruzan} because it can be combined with the votes of the four dissenting Justices to support the constitutionally protected status of the right at issue. See, e.g., \textit{id.} at 302 (Brennan, J., dissenting, joined by Marshall and Blackmun, JJ.); \textit{id.} at 330–31 (Stevens, J., dissenting); see also MEISEL & CERMINARA, \textit{supra} note 11, at 2–11 (making a similar argument regarding Justice O’Connor’s position concerning recognition of the wishes of an incompetent person’s surrogate decisionmaker). Such an approach is not the best reading of \textit{Cruzan}. It would seem
Second, Justice O'Connor went beyond the majority in dealing with the exercise of the right to refuse medical treatment by incompetent persons. In particular, while acknowledging that the Court did not need to address the question, she stated that the duty to "give effect to the decisions of a surrogate decisionmaker . . . may well be constitutionally required to protect the patient's liberty interest in refusing medical treatment." 28 Once again, such a right could be quite significant as a constraint on governmental action. It would suggest, for example, that a state would need to accord deference to a living will or other advance directive. And, perhaps, that a state would need to allow oral evidence concerning an incompetent person's desires. I do not mean to explore these issues here. Rather, I merely suggest that Justice O'Connor's views are significant and would be more so if adopted by the Court. In any event, we have another "constitutional promise" from Justice O'Connor. 29 These promises were to continue when the Court next faced a right to die case.

B. Glucksberg and Vacco: The Right to Physician-Assisted Suicide

Seven years after deciding Cruzan, the Court faced a pair of cases raising a very different right to die issue. In both Washington v. Glucksberg 30 and Vacco v. Quill, 31 the Court confronted different aspects of the same question: whether the Constitution provides any right to a physician's assistance in ending one's life. 32 The Court held in both cases that there was no right to have the assistance of a physician in such an endeavor. 33

odd in the extreme if a position rejected by an opinion with five votes could be said to be the holding of a case. Moreover, as I describe below, the reading is belied as a practical matter by the confusion in the lower courts over Cruzan's import. See infra Part II.

28 Cruzan, 497 U.S. at 289 (O'Connor, J., concurring).

29 Although this Essay is not meant to be an evaluation of Justice O'Connor's broader jurisprudence, it is interesting to note that her use of a concurrence in Cruzan fits comfortably into her broader judging "style." For example, several political scientists have written about Justice O'Connor's use of concurrences as a means to narrow the sweep of majority opinions even when she joins them. See Nancy Maveety, Justice Sandra Day O'Connor: Strategist on the Supreme Court 52-69 (1996); Robert W. Van Sickle, Not a Particularly Different Voice: The Jurisprudence of Sandra Day O'Connor 49-62 (1998); see also Biskupic, supra note 24, at 173-74 (noting Justice O'Connor's use of concurring opinions to shape the development of law). In short, Cruzan is an excellent example of the more general means by which Justice O'Connor approached judging on the Court.


32 Glucksberg raised the issue as a matter of substantive due process. See Glucksberg, 521 U.S. at 705-06. Vacco involved an equal protection challenge based on a claimed difference in treatment between those desiring to refuse or withdraw medical treatment and those wishing to have a doctor's assistance in bringing about death in another manner. See Vacco, 521 U.S. at 796-97.

33 See Glucksberg, 521 U.S. at 728; Vacco, 521 U.S. at 808-09. As with Cruzan, there
As with *Cruzan*, Justice O'Connor provided the fifth vote for the majority opinions of Chief Justice Rehnquist in both *Glucksberg* and *Vacco*. Also as in *Cruzan*, however, she concurred in both cases. And, again as with *Cruzan*, her concurring views differed from those of the majority in a critical respect. In these cases, the critical difference concerned the breadth of the issue being decided. The Chief Justice's opinions essentially sought to close the door on arguments concerning any fundamental right associated with affirmative physician assistance at the end-of-life. Justice O'Connor, on the other hand, took a more incremental approach in the area even as she gave the Chief Justice his critical fifth vote.

Justice O'Connor made clear that her agreement with the majority was premised on her conclusion that the Constitution did not protect a "generalized right to 'commit suicide.'" As to that issue the constitutional debate had ended. However, she also mentioned a "narrower" issue about which she reserved judgment, namely "whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death." As to that question, at least, the issue was still open.

There is disagreement in the academic literature concerning the scope and true import of Justice O'Connor's position. Whatever the merits of the differing positions are a number of excellent commentaries on these cases. See, e.g., MEISEL & CERMINARA, supra note 11, § 12.05[A]; Symposium, Physician-Assisted Suicide: Facing Death After *Glucksberg* and *Quill*, 82 MINN. L. REV. 885 (1998).

Both *Glucksberg* and *Vacco* were unanimous in their results. However, Justices Stevens, Souter, Ginsburg, and Breyer declined to join the majority opinion in either case. See *Glucksberg*, 521 U.S. at 704; *Vacco*, 521 U.S. at 794.

Justice O'Connor concurred in both *Vacco* and *Glucksberg* in a single opinion. See *Glucksberg*, 521 U.S. at 736 n.1 (O'Connor, J., concurring in a single opinion).

The history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it. That being the case, our decisions lead us to conclude that the asserted "right" to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause.

*Id.*

*Id.* at 736 (O'Connor, J., concurring).

*Id.* Justice O'Connor did not feel compelled to address this issue because the record in the cases before her indicated that no person would be denied pain medication even if the provision of such drugs would hasten death. *Id.* at 736–37.

in this debate, there is no question that her position is significant in context because it leaves questions to be resolved in later cases. In other words, the door remained open even if one did not know precisely how far.

At the most basic level, Justice O'Connor's opinion can be cited for the proposition that there may be a constitutional due process right to palliative care (i.e., pain management) at the end of life. That may be a narrow issue, but it is an important one. Moreover, when one combines Justice O'Connor's views in *Glucksberg* and *Vacco* with her statements in *Cruzan* concerning surrogate decisionmaking, the constitutional possibilities expand. In *Glucksberg*, pain management leading even to death might be a constitutionally protected right. In *Cruzan*, one reads that Justice O'Connor believes that the Constitution may also protect the right to surrogate decisionmaking. Thus, the combination of the two principles suggests that the right to physician assistance in pain management could extend to the incompetent person as well, at least to an incompetent person who could be experiencing pain. Again, I am not trying to craft an argument for this assertion, but the seeds for such a position are present in Justice O'Connor's writings.

In the final analysis, whatever the scope of the exception contemplated by Justice O'Connor in *Glucksberg* and *Vacco*, it was certainly noteworthy when compared to the far more absolute positions of the Chief Justice. Colloquially speaking, Justice O'Connor allowed the Constitution to live to fight another day in this area. It was yet another constitutional promise concerning the right to die.

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40 I discuss its importance in greater detail below in connection with cases in which a right to palliative care has not been discussed, thus leaving the constitutional promise unfulfilled. See infra Part II.

41 *See supra* Part I.A (discussing *Cruzan*).

42 Justice O'Connor's physician-assisted suicide position is also consistent with her broader approach to deciding cases. While described in varying ways, that approach is one that focuses on the facts of given disputes so as to decide issues on narrow grounds. The result is that questions are left unresolved so that they may be answered in later cases. See, e.g., Maveety, *supra* note 29, at 29–30 (describing Justice O'Connor's case-by-case approach as "pragmatic centrist"); Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* 75–116 (1999) (discussing the benefits of "minimalist" decisionmaking in the context of the "right to die"); Van Sickle, *supra* note 29, at 45–54 (generally discussing what the author terms Justice O'Connor's "marginalist" approach to decisionmaking); Steven
C. A Summary: Justice O'Connor, Her Promises, and Their Context

As described above, Justice O'Connor has played a central role in the development of the Court's limited jurisprudence concerning the right to die. She has been the fifth vote for the majority opinion in each case in this area, yet she in some respects limited those opinions by expressing more nuanced views in her concurrences. Those concurrences were important for the promises they made, but they were not the "law." The next Part explores how those promises have remained unfulfilled. It also explains why the unfulfilled nature of Justice O'Connor's end-of-life promises is important.

Before moving on, however, a final comment concerning Justice O'Connor's contributions in this area is in order. It would be easy to read Justice O'Connor's opinions in both *Cruzan* and the assisted suicide cases as being heavily influenced by a desire to allow experimentation in the "laboratory of the states." That is certainly true to some extent. But focusing only on a desire for state experimentation is highly misleading. Justice O'Connor's approach to end-of-life issues generally is far more discriminating than that advanced by Chief Justice Rehnquist, for example. At the conclusion of his opinion for the Court in *Glucksberg*, he also advanced state experimentation rhetoric. But the Chief Justice's exultation of experimentation came after he effectively foreclosed meaningful constitutional review in the area at hand. Justice O'Connor, on the other hand, provides for state experimentation only after ensuring that there is a sufficient constitutional floor in place to protect

I. Friedland, *The Centrality of Fact to the Judicial Perspective: Fact Use in Constitutional Cases*, 35 CONN. L. REV. 91, 125–27 (2002) (noting that in both *Cruzan* and *Glucksberg*, Justice O'Connor took a more fact-based approach than did the majority, thus leaving more issues unresolved). Interestingly, one commentator writing after Justice O'Connor announced her retirement has suggested that this case-by-case approach will result in Justice O'Connor's legacy being "limited and ephemeral." Kermit Roosevelt, *The Centrist Cannot Hold*, AM. PROSPECT ONLINE, July 5, 2005, http://www.prospect.org/web/printfriendly-view.ww?id=9933. Whatever the effect on her legacy, one can certainly see the incremental nature of Justice O'Connor's decisionmaking in the context of the Court's right to die cases.


45 See *Glucksberg*, 521 U.S. at 735 (“Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.”).

46 See supra Part I.B (discussing the majority opinion in *Glucksberg*).
individual rights. That difference in approach is a critical one when individual liberty is at issue.\(^7\)

In this Part, I have explained the important legacy that Justice O'Connor leaves concerning the United States Constitution and the right to die. That legacy may not be as visible as her impact on other controversial topics such as abortion and affirmative action, but it should not be undervalued. In the next Part, I explain how Justice O'Connor's constitutional promises remain unfulfilled and why it matters that that is the case.

### II. The Constitutional Promises Remain Unfulfilled

The Supreme Court has not rendered another decision addressing end-of-life matters since *Glucksberg* and *Vacco* in 1997. During that time, Justice O'Connor's tantalizing constitutional promises lay fallow. In this Part, I first explain why that need not have been the case. Thereafter, I explore the implications of these constitutional promises remaining unfulfilled.

#### A. Justice O'Connor's Constitutional Promises Need Not Have Gone Unfulfilled

The Court's trilogy of right to die cases should have been only the beginning of its exploration of the Constitution's role in death and dying in America. Much has been made of Justice O'Connor's incremental approach to deciding cases.\(^8\) An advantage of her "one step at a time" jurisprudence is that it allows the Court to deal with new issues of constitutional law in a deliberative fashion. There is no need to take absolute positions because the Court will return to the area to explore discrete issue after discrete issue. Eventually a body of law will develop as a result of the incrementalist approach.\(^9\) The key to such an approach, however, is that the Court must return to the area in question. If it does not, one is left with only a narrow area of defined law surrounded by a vast expanse of uncertainty. Unfortunately, that is the situation concerning the right to die.

One can see this issue most clearly with respect to Justice O'Connor's suggestion in *Glucksberg* that the Constitution might protect a right to palliative care or pain management.\(^5\) The Court has not decided a case that expressly raised this

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\(^8\) See, e.g., supra note 42 (collecting sources concerning the incremental jurisprudential approach of Justice O'Connor).

\(^9\) For a general discussion and defense of "judicial minimalism" in the "right to die" context, see *Sunstein*, supra note 42, at 75–116.

\(^5\) See *supra* Part I.B (discussing *Glucksberg* and physician-assisted suicides).
issue. Nevertheless, there have been three occasions on which at a minimum Justice O'Connor could have expanded on her constitutional promises. And, who knows, if she had done so she might have convinced enough of her fellow Justices to join her so that the promise would have become the law. I discuss two of these missed opportunities in this Part. I return to the third one near the end of the Essay.51

The first missed opportunity came in 2001 in connection with United States v. Oakland Cannabis Buyers' Cooperative.52 At issue in Oakland Cannabis was whether there was a medical necessity defense to the prohibitions on the manufacture and distribution of marijuana under the federal Controlled Substances Act.53 California had enacted a law designed to shield from state prosecution the distribution of marijuana to those persons who had a doctor’s prescription and who needed marijuana for medicinal purposes.54 Several cooperatives began to distribute the drug given the protections the California law afforded.55 In response to the actions of these cooperatives, federal authorities sought certain civil remedies under the Controlled Substances Act designed to stop the cooperatives from distributing marijuana.56 The cooperatives sought to raise medical necessity as a defense to that civil enforcement action.57 The Court held that there was no such defense under the federal statute.58 It reasoned as a matter of statutory construction that Congress had not enacted the defense and, therefore, a federal court had no discretion to craft a medical necessity exception to the explicit statutory provisions.59

The decision in Oakland Cannabis was unanimous, but the majority opinion garnered only five votes.60 Justice O'Connor joined the majority opinion; she did not write separately to explain whether her views differed in any respect from those of the majority. It is here that she missed an opportunity to expand on her views from Glucksberg. The cooperatives expressly argued that there were people for whom marijuana was required to ease pain.61 They were supported in this argument

51 See infra Part II.B.3.
53 Id. at 486.
54 Id.
55 Id.
56 Id. at 486–87.
57 Id.
58 Id. at 486.
59 See id. at 489–95.
60 Id. at 485. Justice Thomas wrote the majority opinion in which the Chief Justice and Justices O'Connor, Scalia, and Kennedy joined. Justices Stevens, Souter, and Ginsburg concurred in the judgment. Justice Breyer did not participate. Id.
by several amici. These arguments presented a perfect opportunity for Justice O'Connor to further develop her constitutional promise concerning a right to palliative care. She would not necessarily have had to accept the proposition that marijuana in fact had medicinal uses. Instead, she could have explained that if there was a proper evidentiary showing that such was the case, and a patient was able to demonstrate that she would not otherwise be able to avoid pain, there might be constitutional implications regarding the refusal to recognize a medical necessity defense. She did not take this opportunity, however, and the constitutional promise from Glucksberg remained unfulfilled and unexplored.

Justice O'Connor had another opportunity to develop her theory from Glucksberg, this time during what proved to be her final full term on the Court. In 2005, the Supreme Court decided the highly anticipated case of Gonzales v. Raich. Raich also concerned the federal Controlled Substances Act. In this instance, the principal issue the Court faced was whether Congress exceeded its powers under the Constitution's Commerce Clause when it criminalized "the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law." The United States Court of Appeals for the Ninth Circuit had ruled that Congress did not have the authority under the Commerce Clause to take such an action.

In a decision that will likely be debated for some time, the Supreme Court reversed the circuit court. It held that Congress possessed the power under the Commerce Clause to criminalize the manufacture or distribution of marijuana even under such highly localized conditions. This Essay is not the place to explore the import of this decision on Commerce Clause doctrine. What is interesting for present purposes is that Justice O'Connor wrote the principal dissent in the case. Her dissent was a forceful reiteration of the principles of federalism the Court had espoused in earlier cases. Entirely missing from the opinion, however, was any mention whatsoever of a due process limitation on the restriction imposed by the Controlled Substances Act on patients' access to pain relief. Moreover, as with Oakland Cannabis,

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64 Id.

65 U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes . . . .").

66 Raich, 125 S. Ct. at 2204–05.

67 See Raich v. Ashcroft, 352 F.3d 1222 (9th Cir. 2003).

68 See id. at 2204–15.

69 Id. at 2220 (O'Connor, J., dissenting).

Justice O'Connor had before her explicit arguments concerning this important issue. Consequently, Justice O'Connor missed another opportunity to explore and refine the issue she raised in *Glucksberg* and *Vacco*.

One cannot be quite as critical of Justice O'Connor in connection with her *Cruzan* promises. Nonetheless, there is also a sense here of missed opportunity. On several occasions, the Court has had to consider whether to grant a writ of certiorari with respect to an end-of-life case raising issues similar to those in *Cruzan*. For example, in 1995 it was faced with a decision from the Michigan Supreme Court holding that there was no clear and convincing evidence that Michael Martin would have wished to decline life-sustaining medical treatment. The Court declined to take up the case. Thereafter, in 1997 it refused to review a case in which the Supreme Court of Wisconsin had determined that a seventy-one-year-old woman suffering from Alzheimer's disease had not sufficiently made clear her intentions concerning medical treatment before becoming incompetent.

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71 The argument was asserted by the Respondents in the Supreme Court. *See* Brief for Respondents, *Raich*, 125 S. Ct. 2195 (2005) (No. 03-1454). It was also raised by amici in support of the Respondents. *See*, e.g., Brief of the Nat'l Org. for the Reform of Marijuana Laws et al. as Amici Curiae in Support of Respondents, *Raich*, 125 S. Ct. 2195 (2005) (No. 03-1454); Brief of Lymphoma Found. of Am. et al. as Amici Curiae in Support of Respondents, *Raich*, 125 S. Ct. 2195 (2005) (No. 03-1454); Brief of the Leukemia & Lymphoma Soc'y et al. as Amici Curiae in Support of Respondents, *Raich*, 125 S. Ct. 2195 (2005) (No. 03-1454). Indeed, even the majority opinion raised the point. *See* *Raich*, 125 S. Ct. at 2215 (majority opinion) (noting the request of the parties to reach the issue of medical necessity, but declining to do so because the Ninth Circuit had not yet ruled on the question).

72 The Court remanded the case to the Ninth Circuit to consider other arguments asserted by the parties, including certain constitutional issues. *Raich*, 125 S. Ct. at 2215. As of the completion of this Essay, no further proceedings have taken place.

73 *In re Martin*, 538 N.W.2d 399 (Mich. 1995). As with many cases in this area, the facts in *Martin* are tragic. Mr. Martin was in an automobile accident in which he suffered a serious head injury leaving him “significantly impaired in his physical and cognitive abilities.” *Id.* at 402 (quoting *In re Martin*, 504 N.W.2d 917, 920 (Mich. Ct. App. 1993)). Mr. Martin's wife sought an order withdrawing her husband's feeding tube. *Id.* Michael Martin's mother and sister opposed that request. *Id.* After a series of hearings and appeals, the trial court found, and the intermediate Michigan appellate court affirmed, that there was clear and convincing evidence that Michael Martin would not have wished to receive medical treatment, including artificial nutrition and hydration in his medical condition. *Id.* at 403–05. The Michigan Supreme Court reversed this determination. *Id.* at 413. It concluded that the lower courts were incorrect to have determined that the appropriate evidentiary showing had been made. *Id.*


75 *In re Edna M.F.*, 563 N.W.2d 485 (Wis. 1997), *cert. denied sub nom.*, Spahn v. Wittman, 522 U.S. 951 (1997). This case concerned Edna M.F., a seventy-one-year-old woman with severe dementia from Alzheimer's Disease being fed through a feeding tube. *Id.* at 487. She was bedridden but not in a persistent vegetative state. *Id.* Her sister and guardian requested that the hospital allow her to direct the withdrawal of the feeding tube.
Terri Schiavo saga, the Court declined to enter the fray.\footnote{See, e.g., Schiavo ex rel. Schindler v. Schiavo, 125 S. Ct. 1722 (2005) (denying motion for stay of enforcement of judgment pending petition for writ of certiorari); Bush v. Schiavo, 543 U.S. 1121 (2005) (denying certiorari). I discuss Terri Schiavo’s end-of-life drama below. \textit{See infra} Part II.B.2.} I am not suggesting that the lower court in any of these cases was necessarily incorrect. However, the Court missed an opportunity to further refine its jurisprudence in this area along the lines Justice O’Connor suggested in \textit{Cruzan}, which could have been done even if the Court affirmed these lower court decisions.

In sum, the Supreme Court has had the opportunity time and again over the past fifteen years to further address the role of the United States Constitution in death and dying. These opportunities could have been occasions used to expand on and clarify the constitutional promises Justice O’Connor had made. Those opportunities were missed, and, as I describe next, significant negative consequences have resulted.

\section*{B. The Practical Impact of the Unfulfilled Promises}

One might be forgiven for thinking that it is all very interesting as an academic matter that Justice O’Connor made promises concerning the right to die that have not come to pass but that there is no real world impact arising from the situation. Unfortunately, that is not the case. Instead, there are quite dramatic consequences flowing from Justice O’Connor’s unfulfilled constitutional promises. Indeed, it is by no means melodramatic to say that this state of affairs has had a life and death impact in the “real world.” In this Part, I highlight only a few such situations, some of which are widely known and others of which took place largely out of the public eye.

\subsection*{1. The Sad Case of Sheila Pouliot\footnote{I have discussed Ms. Pouliot’s case elsewhere as well. \textit{See} Allen, \textit{Threshold of Life and Death}, supra note 20, at 984–86.}}

In 1999, Sheila Pouliot was in her early forties.\footnote{Blouin v. Spitzer, 356 F.3d 348, 352 (2d Cir. 2004).} As a result of contracting certain diseases as an infant, she had never been competent.\footnote{\textit{Id.}} For her entire life, she required care from others in order to live.\footnote{\textit{Id.}} A member of her family had always served as her legal guardian.\footnote{\textit{Id.}} As of 1999, Ms. Pouliot was chronically ill and in exceedingly poor
health. Among other things, she had lost the ability to eat and drink and was being fed and hydrated through a feeding tube. By December of that year, she was acutely ill and, by all accounts, near death when she was admitted to a hospital in Syracuse, New York.

Ms. Pouliot’s family, including her then-guardian Alice Blouin, consulted with the hospital medical staff, its medical ethics committee, and members of the clergy concerning what treatment to provide Ms. Pouliot. The ultimate conclusion reached by this group was that Ms. Pouliot would be provided with comfort care, such as the administration of morphine for pain, but that “neither artificial nutrition and hydration nor antibiotics would be administered.”

But Ms. Pouliot would not be allowed to pass away peacefully. The New York State Attorney General’s Office put pressure on the hospital to reverse its decision. As a result of this pressure, the hospital provided aggressive care to Ms. Pouliot even though such care was against the advice of her doctors, contrary to the wishes of her family, and caused Ms. Pouliot pain. Eventually, Ms. Pouliot’s family was able to obtain a court order allowing the hospital to follow the originally agreed-upon treatment plan. She passed away shortly thereafter, but her passing did not diminish the pain she had been forced to suffer beforehand.

After Ms. Pouliot’s death, her guardian brought suit against the New York State Attorney General claiming that his actions violated Ms. Pouliot’s federal constitutional rights. The circuit court affirmed the dismissal of this lawsuit. Significantly, it did so because the right to surrogate decisionmaking concerning end-of-life matters was not established clearly enough to support liability. Thus, we see

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82 Id. at 352.
83 Id.
84 Id. The United States Court of Appeals for the Second Circuit described Ms. Pouliot’s condition in the following terms: “She was experiencing low oxygen levels and a high fever. She was suffering from hypotension, aspiration pneumonia, internal bleeding, severe abdominal pain, and a non-functioning intestine.” Id.
85 Id.
86 Id.
87 Id. at 353–54.
88 See id. at 353–55. This point is driven home vividly by the treatment notes of one of Ms. Pouliot’s doctors: “From an ethical standpoint, I believe this continued treatment, however well intentioned, is now inhumane and is causing suffering. From a medical standpoint, it is outside of the bounds of what I consider to be medically indicated care.” Id. at 355 n.4.
89 Id. at 355.
90 Id. at 356.
91 Id. The suit was brought pursuant to 42 U.S.C. § 1983 (2000). Id.
92 Id. at 365.
93 Id. at 359. This conclusion was critical because, under § 1983, state actors have qualified immunity “unless the official ‘violated clearly established rights of which an objectively reasonable official would have known.’” Id. at 358 (quoting Kinzer v. Jackson, 316 F.3d 139, 143 (2d Cir. 2003)).
in the tragic story of Sheila Pouliot the real world impact of the Court's failure to develop the constitutional promises Justice O'Connor had made. Not only would Justice O'Connor's arguments concerning surrogate decisionmaking from *Cruzan* have helped Ms. Pouliot, so would the O'Connor suggestion of a right to pain management at the end of life. Ms. Pouliot was denied her surrogate decisionmaker and, most cruelly, affirmatively made to endure pain. These things did not have to come to pass.

2. The Saga Concerning Terri Schiavo

It seemed as if the entire world was watching earlier this year as Terri Schiavo's family fought over her end-of-life wishes. Theresa Marie Schiavo was twenty-seven years old in 1990 when she lost consciousness, causing her brain to be deprived of oxygen for several minutes. She was eventually diagnosed as being in a persistent vegetative state. After Ms. Schiavo had remained in this state for nearly eight years, Michael Schiavo, Terri's husband and guardian, sought judicial permission to remove the feeding tube keeping his wife's body alive. Ms. Schiavo's parents opposed these efforts, leading to years of quite intense litigation. At every step of the way, courts determined that Ms. Schiavo would not have wanted to continue to receive nutrition and hydration in her current condition. But Ms. Schiavo's parents could not accept this fact and fought to keep their daughter "alive." In addition to using, and perhaps even abusing, the court system, her parents were able to convince both the Florida Legislature and the United States Congress to intercede.

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95 See *In re Guardianship of Schiavo*, 780 So. 2d at 177.

96 *Id.*


101 See *Relief of the Parents of Theresa Marie Schiavo*, Pub. L. No. 109-3, 119 Stat. 15–16 (2005) ("[T]he District Court shall issue such declaratory and injunctive relief as may be
in the case. Only after much wrangling was Terri Schiavo’s body allowed to die on March 31, 2005, after her wishes were finally carried out.\(^{102}\)

There is an incredible amount that could, and probably will, be written about Ms. Schiavo’s life and death, but this is not the place for such endeavors.\(^{103}\) Rather, I want to draw attention to a thread that seemed to run throughout the drama surrounding Ms. Schiavo. At various points in the struggle to effectuate her end-of-life wishes, a range of governmental entities took actions designed to impede the removal of her feeding tube even after it had been determined in judicial proceedings that such removal was her desire. It seems to me quite unlikely that these actions would have been taken, or at least taken in the manner they were, if the right to surrogate decisionmaking in death and dying was more explicit. Two examples are sufficient to make the point.

First, by October 2003, Ms. Schiavo’s parents had exhausted all their avenues of appeal and their daughter’s feeding tube had been removed pursuant to the order of a Florida court.\(^{104}\) At that point, a tremendous amount of political pressure was placed on the Florida Legislature and Florida Governor Jeb Bush to “save Terri Schiavo.”\(^{105}\) Following this pressure, the Florida legislature enacted what popularly became known as Terri’s Law.\(^{106}\) Terri’s Law essentially applied only to Ms. Schiavo and allowed the governor to unilaterally issue a one-time “stay” of any order to remove a feeding tube from someone in Ms. Schiavo’s condition.\(^{107}\) Pursuant to the Act, Governor Bush directed that Ms. Schiavo be physically removed from her hospice and have a feeding tube surgically reinserted.\(^{108}\) Terri’s Law was ultimately declared unconstitutional under the Florida Constitution, but only after Ms. Schiavo’s wishes concerning the control of her body had been thwarted, at least in the short


\(^{105}\) See Allen, Threshold of Life and Death, supra note 20, at 1009–12 (discussing political pressures on legislators in October 2003).


\(^{107}\) Id.

run." One hopes that Florida’s legislature and the governor of the state would not have taken such a clumsy step to deprive a citizen of a firmly established federal right.

A less clumsy illustration of an attempt to thwart Ms. Schiavo’s rights came in March 2005 after a Florida court had yet again ordered the removal of Ms. Schiavo’s feeding tube. This time, it was the United States Congress that intervened when it passed Public Law 109-3, "An Act for the relief of the parents of Theresa Marie Schiavo." This Act conferred federal court jurisdiction over a claim by Ms. Schiavo’s parents that their daughter’s federal constitutional or statutory rights had been violated in connection with the Florida state court proceedings. As with Florida’s Terri’s Law, the federal statute was largely the result of politics. Ms. Schiavo’s parents filed a claim under the statute, but it was rejected, and their daughter was allowed to pass away. However, once again, it would seem logical to suppose that Congress would not have acted as it did if there had been clearer constitutional protections of the right to make end-of-life decisions.

3. The Imposition of Morals by Fiat

In 1994, the citizens of Oregon approved a referendum to legalize physician-assisted suicide. Pursuant to that referendum, the Oregon legislature passed the Death with Dignity Act. The statute was narrowly drawn to allow a small subset of Oregonians to have the assistance of a doctor in ending their lives. If one stopped the story at this point it would seem that experimentation in the states was working; Oregon could go its way on a contentious issue while other states went in a different direction. But the story does not end here.
In 2001, then-United States Attorney General John Ashcroft issued what has come to be known as the “Ashcroft Directive.” The Ashcroft Directive asserted that physician-assisted suicide served no “legitimate medical purpose” under the federal Controlled Substances Act. As such, engaging in conduct allowed under the Oregon Death with Dignity Act could subject doctors, pharmacists and others to the revocation of their licenses. The United States Court of Appeals for the Ninth Circuit affirmed a district court injunction against the Directive. The circuit court ruled that the Attorney General had exceeded his authority with respect to the Controlled Substances Act. The court did not reach any issues concerning individual end-of-life rights other than to refer to the Supreme Court’s dicta that these matters should be left to the states. The United States Supreme Court accepted the government’s appeal.

The Supreme Court affirmed the Ninth Circuit’s judgment. With Justice O’Connor in the majority, the Court held that Attorney General Ashcroft had acted far beyond his authority when he promulgated the regulation at issue. The Court’s

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119 See id. at 56,608.
120 Id.
121 Oregon v. Ashcroft, 368 F.3d 1118 (9th Cir. 2004).
122 Id. at 1125–30.
123 See id. at 1123.
127 See id. at 925. The strength of the Court’s rejection of the Government’s arguments in the case is apparent in the final paragraph of the majority opinion:

The Government, in the end, maintains that the prescription requirement delegates to a single Executive officer the power to effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality. The text and structure of the [Controlled Substances Act] show that Congress did not have this far-reaching intent to alter the federal-state balance and the congressional role maintaining it.

Id.
opinion is devoted almost entirely to fundamental concepts of administrative law. It does not deal with the underlying death and dying related matters other than to note that the Court has left debate on the issue to state-based debate.

Significantly for present purposes, Justice O'Connor elected not to write separately. Thus, in what was one of her final decisions as a member of the Court she failed once again to take steps that would have advanced the positions she outlined earlier. The promises remained unfulfilled.

In sum, then, the Ashcroft Directive was an unabashed attempt to impose a certain moral position on the citizens of Oregon, and everywhere else for that matter. It did not matter that the people of that state had determined to allow greater freedom than the Court had previously found protected by the Constitution. The simple fact of the matter was that Attorney General Ashcroft believed that physician-assisted suicide was morally wrong, and he used his power to impose that view on every man, woman, and child in the United States. Such morality by fiat would not be possible, or at least it would be a great deal more difficult to impose, if Justice O'Connor's constitutional promises had been fulfilled. In the end, the failure of the Court, and perhaps Justice O'Connor in particular, to secure the right of dying citizens is lamentable, even if the decision to reject the imposition of morality by fiat is a welcome one.

III. THE UNCERTAIN FUTURE

This Essay has discussed the central role Justice O'Connor played in the development of the Supreme Court's jurisprudence on the "right to die" with a special emphasis on her unfulfilled promises in the area. Her ability to fulfill those promises has now passed. Instead, this ability now rests with her replacement. Accordingly,

128 In particular, the Court held that the Attorney General's action did not warrant deference as an agency interpretation of its own rules or of an ambiguous statutory provision. Id. at 915-22.
129 See, e.g., id. at 911, 921.
130 Portions of the Court's opinion appear to recognize this fact. For example, in rejecting the Government's position the Court noted that to accept the Government's logic would give "extraordinary power" to the Attorney General. Id. at 918. Continuing, the Court said "If the Attorney's General's argument were correct, his power to deregister necessarily would include the greater power to criminalize even the actions of registered physicians, whenever they engage in conduct he deems illegitimate." Id.
131 The President nominated Circuit Judge Samuel Alito to replace Justice O'Connor. See Bush Nominates Alito to Supreme Court, CNN.com, Nov. 1, 2005, http://www.cnn.com/2005/POLITICS/10/31/scotus.bush/index.html [hereinafter Bush Nominates Alito]. He was confirmed by the Senate on January 31, 2006. Alito Sworn in as Nation's 110th Supreme Court Justice, CNN.com, Feb. 1, 2006, http://www.cnn.com/2006/POLITICS/01/31/alito/index.html. Justice Alito has apparently not faced an end-of-life case in his time on the bench. Thus, while he is said to be conservative, see Bush Nominates Alito, supra, one would be engaging largely in speculation in terms of assessing how Justice Alito would rule on the right to die.
we are in all likelihood entering a period of marked uncertainty in the law in this area as well as many others. As one media outlet succinctly put it when now-Chief Justice Roberts had been nominated to fill Justice O’Connor’s seat: “Swap John Roberts for Sandra Day O’Connor and what do you get?”132 What is certain, however, is that much as Justice O’Connor’s unfulfilled promises have had a tremendous impact so too will the views of Chief Justice Roberts and Justice Alito. Time alone will tell what that impact will be, but we will all be affected by the direction the Court takes because one day death will inevitably come for each of us.