



Putting Federalism to Sleep

The wrong way to argue against assisted suicide.

by Nelson Lund

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THE BUSH ADMINISTRATION CLAIMS THE authority to stop Oregon physicians from using prescription drugs to implement that state's unique program of physician-assisted suicide. But the administration's effort to use an ambiguous federal drug statute to undermine Oregon's assisted suicide law is a betrayal of conservative legal principles. *Gonzales v. Oregon*, argued before the Supreme Court earlier this month, may give an early signal about the commitment of the emerging Roberts Court to those principles. And the Court's decision could have unexpected implications for a range of other issues, including future policies about abortion.

Like the administration, I believe that the people of Oregon made a terrible mistake when they voted in two separate popular referenda to authorize Oregon doctors to help their patients commit suicide. Physicians are uniquely empowered by their technical knowledge and the nature of their work either to heal or to kill, and their patients know it. For millennia, the chief safeguard against abuse of this power has been the Hippocratic ethic, which forbids a doctor from seeking to hasten the death of any patient. That ethic was compromised when physicians began to violate a related Hippocratic prohibition of abortion, and it has continued to crumble in the face of pressures for doctors to make moral decisions (masquerading as medical decisions) about whose life is worth preserving. The Oregon law is a step along the path toward a world of legalized euthanasia in which seriously ill people will have good reasons to worry about what their doctors are up to.

Unlike the Bush administration, however, I believe the voters of Oregon are adults who are entitled to make their own decisions about this important policy question, even if they disagree with me. Among the signal achievements of the late Chief Justice Rehnquist was his long crusade to revive the constitutional principle of federalism. That principle demands that the people of each state be allowed to govern themselves as they see fit, so long as their decisions are not forbidden by the Constitution itself (as in certain decisions involving racial discrimination) or by federal statutes covering issues assigned by the Constitution to the jurisdiction of Congress (such as the regulation of foreign and interstate commerce).

The constitutional principle of federalism suggests that Oregon's assisted suicide law should be immune from congressional interference. Virtually all of the people affected by Oregon's law will be Oregonians, and there is nothing in Oregon's decision that will interfere with other states' ability to choose a different policy in regulating their own physicians. In any event, Congress has not clearly authorized the Bush administration to interfere with Oregon's decision. The federal statute generally requires that doctors with state licenses to prescribe drugs be given a federal license as well. Federal authorities do have a vaguely worded authorization to yank the licenses of doctors who behave irresponsibly, which was aimed at allowing federal agents to quickly shut down doctors who set up shop as drug dealers. The Bush administration is using this provision to claim a power to override any

state law involving prescription drugs if the attorney general disagrees with that state's chosen policy about the proper use of such drugs.

The drug statute can easily be interpreted to leave policy decisions about medical practice to the states. The statute does not clearly grant the authority the administration is claiming, and it might be unconstitutional if it did. In any event, there was absolutely no necessity for the administration to claim this power (which reversed the Justice Department's previous position). This is a legally gratuitous departure from the principle that the states are free to manage their own internal affairs unless a valid federal law clearly constrains their discretion.

There may be further implications. If the Roberts Court eventually overrules *Roe v. Wade*, as I believe it should, the abortion issue will return to the democratic processes of each state, which is where it lay before the Supreme Court usurped state authority. We can be sure that interest groups on both sides of that issue--none of which is likely to have enough political support to obtain a clearly worded federal statute, let alone a constitutional amendment--will seek to get future administrations to attack state laws they disagree with, using maneuvers like the one the Bush administration has adopted here.

Assisted suicide is a serious issue. So is abortion. Less visibly, but no less important, this case involves the obligation of judges to be faithful to the constitutional principle of federalism. That principle should be especially significant in guiding the resolution of controversial issues, but the principle seldom has a strong political constituency. For that reason, whatever our views on assisted suicide and abortion, we should all hope that in this case the new chief justice will be true to Rehnquist's spirit rather than to the will of the president who appointed him.

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