

# DEATH WITH DIGNITY'S EMERGING CONCEIT: COULD *VACCO V. QUILL* BE LOSING ITS APPEAL?

ARTHUR G. SVENSON\*

## INTRODUCTION

Historic, too: on Election Day, November 4, 2008, not only the first African-American became President of the United States, but the State of Washington became one of only a handful of jurisdictions in the world<sup>1</sup>—and the second in the United States<sup>2</sup>—to legalize the choice “of certain terminally ill, competent adults . . . to request and self-administer lethal medication prescribed by a physician.”<sup>3</sup> Journalistic accounts of Washington’s Initiative 1000 (I-1000) suggested that its provisions “modeled,”<sup>4</sup> “mirror[ed],”<sup>5</sup> or “replicate[d]”<sup>6</sup> those in

---

\*Arthur G. Svenson is David Boies Professor of Government, University of Redlands. My work with the *University of La Verne Law Review* has been deeply gratifying. I am particularly indebted to Editor-in-Chief Olen Guiab, Chief Articles Editor Philip Stutzman, Juvenile Issue Editor Blake G. Harrison, and Associate Editor Shanna Burkholder. At every turn of the page, you rewarded me with your commentary and suggestions—meaningful, careful, exacting, and constructive all. *Bravi, Tutti*. I dedicate this Article to Cece and Elle: composed of determination, intelligence, spirit, and love, you are the soaring Ninths’ Ninth.

1. See Derek Humphrey, comp., *Treat Carefully When You Help to Die: Assisted Suicide Laws Around the World*, ASSISTED SUICIDE, Mar. 1, 2005, [http://www.assistedsuicide.org/suicide\\_laws.html](http://www.assistedsuicide.org/suicide_laws.html).

2. See *id.* Oregon was the first state to enact a physician-assisted dying statute. The Oregon Death with Dignity Act, OR. REV. STAT. ANN. §§ 127.800-127.897 (West 2009).

3. The Washington Death with Dignity Act, WASH. REV. CODE ANN. § 70.245 (West 2009).

4. Carol M. Ostrom, *Just Don’t Call It Suicide, Initiative’s Backers Say*, THE SEATTLE TIMES, Jan. 10, 2008, [http://seattletimes.nwsourc.com/html/localnews/2004115054\\_death09m.html](http://seattletimes.nwsourc.com/html/localnews/2004115054_death09m.html).

5. Curt Woodward, *Aid-in-Dying Initiative Likely to Make Ballot, Supporters Say*, THE SEATTLE TIMES, July 2, 2008, [http://seattletimes.nwsourc.com/html/localnews/2008029707\\_websuicide02.html](http://seattletimes.nwsourc.com/html/localnews/2008029707_websuicide02.html).

6. John Iwasaki, *Physician’s Education on End-of-Life Measure Begins, Groups Will Look to Oregon Cases*, SEATTLE POST-INTELLIGENCER, Nov. 6, 2008, [http://www.seattlepi.com/local/386565\\_suicide06.html](http://www.seattlepi.com/local/386565_suicide06.html).

Oregon's Death With Dignity Act, a voter-approved initiative legalizing physician-assisted dying (PAD) that took effect in 1998.<sup>7</sup> For advocates of PAD, the victory margins in each state were both reaffirming and prescient: 20% in Oregon, 18% in Washington.<sup>8</sup>

Thus, a decade or so after Oregon's innovation, discussions about end-of-life options, and PAD in particular, fully engaged the nation. Discussions, indeed, and not just among concerned citizens: thirty-one days following the passage of Washington's I-1000, Montana District Court Judge Dorothy McCarter wrestled with a complaint brought by a "75-year-old retired truck driver from Billings" dying from a terminal form of cancer who "challenge[d] the constitutionality of the application of [Montana's] homicide statutes to physician-assisted suicide."<sup>9</sup> Historic, again, was her decision: Judge McCarter held that "the Montana constitutional rights of individual privacy and human dignity, taken together, encompass the rights of a competent terminally patient [sic] to die with dignity."<sup>10</sup> With her pronouncement, Judge McCarter became the first state court judge in the United States to affirm "a patient's right to die with dignity [that includes] protection of the patient's physician from liability under the State's homicide statutes."<sup>11</sup> Having denied a motion by the State's Attorney General on January 6, 2009, to "stay the judgment pending appeal,"<sup>12</sup> for now the short list of states to legalize PAD numbers three.<sup>13</sup>

The PAD debate generated and regenerated by events in Oregon, Washington, and Montana, is not only fully engaged, but the logic of the debate has been recast, reframed, or reconstructed by its advocates in ways both subtle and significant. Proponents of PAD advance the claim that "physician-assisted suicide," ubiquitously linked to Oregon's

---

7. The Oregon Death with Dignity Act, OR. REV. STAT. ANN. §§ 127.800–127.897 (West 2009).

8. See OREGON DEPARTMENT OF HEALTH SERVICES, DEATH WITH DIGNITY ACT HISTORY (2006), <http://www.oregon.gov/DHS/ph/pas/ar-index.shtml> (follow "History" hyperlink); Janet I. Tu, *Rules Governing State's Death with Dignity Law Debated*, THE SEATTLE TIMES, Feb. 11, 2009, [http://seattletimes.nwsourc.com/html/localnews/2008730971\\_death11m0.html](http://seattletimes.nwsourc.com/html/localnews/2008730971_death11m0.html).

9. *Baxter v. State*, No. ADV-2007-787, 2008 WL 6627324 (Mont. 1st Dist. Dec. 5, 2008).

10. *Id.*

11. *Id.*

12. Kevin B. O'Reilly, *Montana Judge Rejects Stay of Physician-Assisted Suicide Ruling*, AM. MED. NEWS, Jan. 29, 2009, <http://www.ama-assn.org/amednews/2009/01/26/prsd0129.htm>.

13. The Oregon Death with Dignity Act, OR. REV. STAT. ANN. §§ 127.800–127.897; The Washington Death with Dignity Act, WASH. REV. CODE ANN. § 70.245 (WEST 2009); *Baxter*, 2008 WL 6627324 (legalizing PAD in Montana).

end-of-life option, is a misleading, even inaccurate term, employed uncritically by many, or pejoratively by opponents.<sup>14</sup> The *emerging conceit* advanced by death with dignity advocates holds that a patient's decision to self-administer lethal medications prescribed by a physician "is not suicide."<sup>15</sup> Terminally ill, competent adults who choose the Oregon-Washington-Montana option are rational, and in truth, desperately "want to live"; however, their death is inevitable and imminent, and their pain is intractable and intolerable. Thus, for a small number of patients *in extremis* and nearing the end of their dying process, only "physician-assisted dying" or "aid in dying"<sup>16</sup> can hasten a "humane and dignified death." For such patients, their "least worst choice" has now been legalized in three states—and, in the case of Washington's I-1000, the language of the statute notably trumpets "nature" not "suicide" as the cause of death.<sup>17</sup>

Politically speaking, when the PAD option is decoupled from negative connotations commonly attached to suicide, it fares better in public opinion polls.<sup>18</sup> For this reason, in the overwhelming number of states identified by the Supreme Court as criminalizing all forms of "assisting in the suicide of others,"<sup>19</sup> voter initiatives or legislative efforts aimed at the legalization of PAD could be expected to attract increased support were they framed sans suicide.

Legislative strategies aside, death with dignity's emerging conceit, whether "in fact or opinion,"<sup>20</sup> could have utterly profound consequences in state courtrooms around the country given the course navigated by the Supreme Court in its 1996 term. At that time, two highly anticipated "physician-assisted suicide"<sup>21</sup> cases were resolved, each resting on different clauses of the United States Constitution.

---

14. See generally Kathryn L. Tucker & Fred. B. Steale, *Patient Choice at the End of Life: Getting the Language Right*, 28 J. LEGAL MED. 305 (2007) (arguing against the use of the terms "assisted suicide" or "killing"); InternationalTaskForce.org, *One Judge's Ruling Makes Assisted Suicide Instantly Legal in Montana*, <http://www.internationaltaskforce.org/iua47.htm> (last visited Nov. 20, 2009).

15. *Id.*

16. Proponents argue these terms are value-neutral frames. *Id.*

17. See The Washington Death with Dignity Act, WASH. REV. CODE ANN. § 70.245.

18. SUSAN M. BEHUNIAK & ARTHUR G. SVENSON, *PHYSICIAN-ASSISTED SUICIDE: THE ANATOMY OF A CONSTITUTIONAL LAW ISSUE* 18 (2003).

19. *Vacco v. Quill*, 521 U.S. 793, 807 (1997).

20. *Id.* at 799 (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

21. During the 1996 Supreme Court term, "physician-assisted suicide" was the terminology used by the Court to frame this issue. See *Vacco v. Quill*, 521 U.S. 793 (1997); *Washington v. Glucksberg*, 521 U.S. 702 (1997).

In *Washington v. Glucksberg*,<sup>22</sup> the Court repudiated arguments that would have transformed physician-assisted suicide into a “fundamental liberty interest protected by the Due Process Clause” of the Fourteenth Amendment.<sup>23</sup> A unanimous Court concluded that such a right was not “deeply rooted in this Nation’s history and tradition.”<sup>24</sup> Equally important, the Court determined that state laws banning assisted suicide were “rationally related to legitimate government interests,”<sup>25</sup> such as the preservation of life, preventing suicide, safeguarding the integrity and ethics of the medical profession, protecting vulnerable groups, and avoiding the slippery slope into variations on the theme of euthanasia.<sup>26</sup>

In *Vacco v. Quill*,<sup>27</sup> the companion case, PAD advocates contended that a person’s decision to withdraw or to withhold life-sustaining medical treatment<sup>28</sup> was equivalent to a terminally ill, competent adult’s decision to end her or his life with the assistance of a physician; therefore, on equal protection grounds, state prohibitions against assisted suicide discriminated against a narrowly circumscribed class of patients who might have otherwise qualified for PAD.<sup>29</sup> As was the case in *Glucksberg*, a unanimous *Vacco* Court was not persuaded.<sup>30</sup> The distinction between withdrawing or withholding life-sustaining medical treatment and physician-assisted suicide was constitutionally significant: in the former the patient “dies from an underlying fatal disease or pathology,” and in the latter “the patient ingest[ing] lethal medication prescribed by a physician . . . is killed by that medication.”<sup>31</sup>

Thus, having resisted federalizing exceptions to state bans on suicide assistance, Rehnquist’s often-quoted conclusion to his *Glucksberg* opinion reads like a states-only invitation to resolve as they see fit the “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.”<sup>32</sup>

---

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

23. *Id.* at 728.

24. *Id.* (quoting *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 503 (1977)).

25. *Id.* at 728.

26. *See id.* at 785.

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

28. *See Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261 (1990) (recognizing a constitutionally protected liberty interest in a person’s decision to withdraw or to withhold life-sustaining medical treatment).

29. *Vacco*, 521 U.S. at 807.

30. *Vacco*, 521 U.S. 793; *Glucksberg*, 521 U.S. 702.

31. *Vacco*, 521 U.S. at 801.

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

The holding of one Montana judge, who discovered a fundamental right to PAD within enumerated state rights to privacy and dignity, is unlikely to have a parroting effect upon non-Montanan state judges reviewing the constitutional implications of death with dignity issues. After all, Montana's is only one of five state constitutions that contain substantive enumerations of privacy rights,<sup>33</sup> and for three of those that do, California, Florida, and Alaska, judges have already considered and denied pleadings that state privacy rights shield actions of patients and willing physicians from criminal prosecution for actions amounting to assisted suicide.<sup>34</sup> For the Justices of the Supreme Court, the absence of a "careful description of [an] asserted fundamental liberty interest"<sup>35</sup> in the Bill of Rights that even remotely resembled PAD proved pivotal in convincing them to decline *Glucksberg's* invitation to create such a right on their own.<sup>36</sup> Given that reasoning, then, one could quite plausibly imagine that most judges in most states confronting similar state challenges on cognate state constitutional grounds would unhesitatingly follow the High Court's lead and choose to defer to the prevailing forces at play in the political arena.

This Article contends that such would not be the case if PAD arguments were fashioned out of the principle of equal protection—rendered especially true in light of death with dignity's emerging conceit. First, unlike the right to privacy, state constitutions "are a rich source of protection for equality,"<sup>37</sup> and while the principle is expressed in a variety of ways, the fundamental law in every state contains provisions that parallel the Fourteenth Amendment's requirement mandating "the equal protection of the laws."<sup>38</sup> Second, while the *Vacco* Court held that state law can distinguish between a class of patients that desires to withdraw or withhold life-sustaining medical treatment from a class that desires physician-assisted suicide,<sup>39</sup> if either "fact or opinion" holds that PAD is not suicide, then the force of *Vacco's* reasoning would have lost its appeal.

---

33. Linda F. Mischler, *Reconciling Rapture, Representation, and Responsibility: An Argument Against Per Se Bans on Attorney-Client Sex*, 10 GEO. J. LEGAL ETHICS 209, 233 n. 130 (1997).

34. See *Sampson v. State*, 31 P.3d 88 (Alaska 2001); *Donaldson v. Lungren*, 4 Cal. Rptr. 2d 59 (Cal. Ct. App. 1992); *Krischer v. McIver*, 697 So. 2d 97 (Fla. 1997); *Baxter v. State*, No. ADV-2007-787, 2008 WL 6627324 (Mont. 1st Dist. Dec. 5, 2008).

35. *Glucksberg*, 521 U.S. at 721.

36. *Id.*

37. Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L.J. 1013, 1018 (2003).

38. See generally *id.* at 1054.

39. *Vacco v. Quill*, 521 U.S. 793, 808 (1997).

The judicial prospect for a reconstructed, reinvigorated application of equal protection principles in state courts, designed to overcome legal obstacles for terminally ill, competent adults, is the focus of this Article. In Part I, a more thorough examination of Rehnquist's *Vacco* argument is provided; that *Vacco*'s equal protection framework was applied by Montana's Judge McCarter in a case that otherwise established a fundamental substantive right to PAD on state constitutional grounds speaks volumes to the uncritical staying power of an equal protection paradigm whose logic might ultimately be upended by death with dignity's emerging conceit. In Part II, the laws legalizing PAD in Oregon and Washington are compared. The purpose of this comparison is to demonstrate that while Washington's statute is virtually identical in form to Oregon's, subtle substantive differences may drive dramatically different outcomes under an equal protection analysis. Finally, in Part III, an argument will be advanced to demonstrate that the persuasive force of *Vacco*'s reasoning is made prostrate before death with dignity's emerging conceit, and that in state courts—or even on appeal, conceivably, to the United States Supreme Court—*Vacco*'s equality jurisprudence could be losing its appeal.

### I. VACCO'S TEACHING

*Vacco v. Quill* was decided by the Supreme Court on June 26, 1997, and the Equal Protection Clause of the Fourteenth Amendment took center stage.<sup>40</sup> The issue in *Vacco* turned on an apparent conflict between, on the one hand, a constitutionally recognized liberty interest protecting a patient's right to withhold or withdraw life-sustaining medical treatment, and, on the other, a New York law prohibiting assisted suicide.<sup>41</sup>

The legal theory then advanced by advocates of physician-assisted suicide was not a particularly complicated one. The patient who sought death by refusing medical treatment was indistinguishable from the patient who sought death with the assistance of a physician since in either instance both patients would have committed suicide.<sup>42</sup> Thus, since one was legal and the other was a crime, New York's law violated the Supreme Court's accepted framework for applying the demands of the Equal Protection Clause: the Equal Protection Clause "creates no substantive rights. Instead, it embodies a general rule that States must

---

40. *Vacco*, 521 U.S. 793.

41. *Id.* at 796.

42. *Id.* at 793-98.

treat like cases alike but may treat unlike cases accordingly.”<sup>43</sup> To be sure, *Vacco* was on the nation’s constitutional radar precisely because a three-judge panel for the Second Circuit Court of Appeals unanimously held that New York’s ban on assisted suicide as it applied to physician-assisted suicide had shipwrecked on the Equal Protection Clause.<sup>44</sup> In that ruling, concluded Circuit Judge Miner, since a patient’s choice to withhold or remove life-sustaining medical treatment “is nothing more nor less than suicide[,] [i]t simply cannot be said that those mentally competent, terminally-ill persons who seek to hasten death but whose treatment does not include life support are treated equally.”<sup>45</sup>

Chief Justice Rehnquist, for a unanimous *Vacco* Court, overturned the Second Circuit’s holding.<sup>46</sup> Upholding New York’s law was considerably easier for the Supreme Court than wrestling with other types of equal protection cases, in large part because New York’s prohibition against assisted suicide did not burden a fundamental right.<sup>47</sup> For that reason, the distinction between withdrawing life support and physician-assisted suicide would be “entitled to a ‘strong presumption of validity,’”<sup>48</sup> and would be sustained if the legislature’s judgment were merely rational<sup>49</sup>—echoing Justice Holmes’s famously vindicated “reasonable man” test from *Lochner v. New York*.<sup>50</sup>

Could the reasonable man locate a constitutionally significant difference to justify a law distinguishing terminally ill persons who declined medical treatment from those who sought “physician-assisted suicide?” New York thought so, and with “rationality assists” from medical and legal traditions on grounds of both causation and intent.<sup>51</sup> As for causation, the patient who withdraws medical treatment “dies from an underlying fatal disease or pathology,” but the patient who “ingests lethal medication prescribed by a physician . . . is killed by that medication.”<sup>52</sup> In the former, death is caused by an “underlying medical condition,” or by “natural causes,” or by an “underlying disease”;<sup>53</sup> in the latter, death is caused by “an artificial death-producing devise.”<sup>54</sup>

---

43. *Id.* at 799.

44. *Quill v. Vacco*, 80 F.3d 716, 732 (2d Cir. 1996).

45. *Id.*

46. *See Vacco*, 521 U.S. at 797.

47. *See id.*

48. *Id.* at 800 (quoting *Heller v. Doe*, 509 U.S. 312, 319 (1993)).

49. *Id.* at 800–01.

50. *See Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

51. *Vacco*, 521 U.S. at 800–01.

52. *Id.* at 800.

53. *Id.*

54. *Id.* at 798 (quoting *Quill v. Koppell*, 870 F. Supp. 78, 84 (S.D.N.Y. 1994)).

Analysis from the intent perspective proved particularly instructive, too; as Rehnquist explains, since the liberty interest protecting a patient's decision to withdraw life support stems from "well-established, traditional rights to bodily integrity and freedom from unwanted touching,"<sup>55</sup> the physician who honors that directive "purposely intends, or may so intend, only to respect his patient's wishes and 'to cease doing useless and futile or degrading things to the patient. . . .'"<sup>56</sup> Furthermore, claims the Chief Justice, "[t]he same is true when a doctor provides aggressive palliative care . . . the physician's purpose and intent is, or may be, only to ease his patient's pain."<sup>57</sup> The physician's intent is quite different if physician-assisted suicide is the patient's choice: here the physician "must necessarily and indubitably, intend primarily that the patient be made dead."<sup>58</sup> In both of these ways, New York's law criminalizing assisted suicide "reaffirmed the line between 'killing' and 'letting die,'" and clearly on the "letting die" side is the rationally defensible position that "merely declining medical care . . . is not considered a suicidal act."<sup>59</sup>

For the *Vacco* Court, in sum, (1) because the Constitution's Equal Protection Clause "does not require things which are different *in fact or opinion* to be treated in law as though they were the same,"<sup>60</sup> (2) because in the opinion of New York physician-assisted suicide is a subset of assisted suicide, and freedom from touching is not,<sup>61</sup> (3) because nearly every state in the Union shares New York's opinion,<sup>62</sup> and (4) because medical and legal traditions "widely recognize and endorse" that opinion,<sup>63</sup> it follows that New York acted rationally to ban physician-assisted suicide, and did so without violating the principle of equality embraced by the Fourteenth Amendment.<sup>64</sup>

*Vacco's* teaching has been dismantled in some quarters of the scholarly community. As rationales to distinguish withholding or withdrawing life-sustaining medical treatment from physician-assisted

---

55. *Id.* at 807 (citing *Cruzan v. Dir., Mo. Dep't. of Health*, 497 U.S. 261, 287-288 (1990) (O'Connor, J., concurring)).

56. *Id.* at 801-02 (quoting *Assisted Suicide in the United States: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 368 (1996) [hereinafter *Hearing*] (testimony of Dr. Leon R. Kass)).

57. *Vacco*, 521 U.S. at 802.

58. *Id.* (quoting *Hearing*, *supra* note 56, at 367 (testimony of Dr. Leon R. Kass)).

59. *See id.* at 803, 806.

60. *Id.* at 799 (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)) (emphasis added).

61. *See id.* at 793, 807.

62. *See id.* at 804.

63. *Vacco*, 521 U.S. at 800.

64. *See id.* at 807-08.

dying, both causation and intent, writes Stephen D. Smith, “wilt[] under examination.”<sup>65</sup> As for the causation-based distinction, the but-for causes of death in both instances are the same, namely a patient’s decision and a doctor’s cooperation; thus, “but for their actions, death would not have occurred when it did.”<sup>66</sup> Additionally, Smith argues, few would deny that removal of life-sustaining medical treatment is the cause of death “if a doctor removed a feeding tube without the patient’s consent,”<sup>67</sup> or, quoting Judith Jarvis Thompson, “[i]f a deep-sea diver is attached by a pipe to a breathing apparatus on board ship, and I’m a passenger and cut the pipe, surely I do kill the diver.”<sup>68</sup> As for the intent-based distinction, if truth be told the intention that explains both withholding or withdrawing life-sustaining medical treatment and physician-assisted dying would be precisely the same in most instances—that patients and physicians both intend to hasten death; on this count, Smith concludes, “the Court’s attempt to explain the distinction in terms of different intentions was unpersuasive.”<sup>69</sup>

Scholarly reservations notwithstanding, the *Vacco* teaching—that in the absence of a fundamental right, “things which are different *in fact or opinion*”<sup>70</sup> can be treated differently in law if the distinction crafted is a rational one—probably does not “wilt[] under examination” if Holmes’s reasonable man not the sophisticated scholar guides the Court. Given this standard of reasonableness, the letting die versus killing distinction probably has principled significance for citizens and legislators in New York, and if, as the Court maintained, their judgment is “entitled to a ‘strong presumption of validity,’”<sup>71</sup> it is no surprise that *Vacco* sustained New York’s law. In this revealing way, too, although Holmes penned the words in *Lochner*, his could have just as easily been Rehnquist’s in *Vacco*: said Holmes, “a reasonable man might think [the New York law] is a proper measure on the score of health.”<sup>72</sup>

Little wonder that state courts that have addressed *Vacco*-like questions have also deferred to state legislative judgments. In *Donaldson v. Lungren*, a California appellate court rejected the view that “a refusal of further medical treatment is a legal fiction for

---

65. Steven D. Smith, *De-Moralized: Glucksberg in the Malaise*, 106 MICH. L. REV. 1571, 1576 (2008).

66. *Id.*

67. *Id.* at 1577.

68. *Id.*

69. *Id.* at 1579.

70. *Id.* (emphasis added).

71. *Vacco v. Quill*, 521 U.S. 793, 800 (1997) (quoting *Heller v. Doe*, 509 U.S. 312, 318 (1993)).

72. See *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

suicide.”<sup>73</sup> In *Krischer v. McIver*, the Florida Supreme Court trod down *Vacco*’s path in finding a “meaningful difference between refusing medical treatment and obtaining a physician’s assistance in committing suicide,” since the former permits “a natural course of events to occur” and the later invites “an affirmative act designed to cause death—no matter how well-grounded the reasoning behind it.”<sup>74</sup> Finally, in *Sampson v. Alaska*—and as if on cue, the Alaska Supreme Court repudiated the position that the state’s ban on assisted suicide “creates arbitrary distinctions”;<sup>75</sup> far from it, “the long-recognized distinction between action and forbearance”<sup>76</sup> provides a reasonable justification for state law that honors a patient’s wish to withdraw or withhold life-sustaining medical treatment but holds a physician criminally liable for “affirmative actions” that abet a patient’s death by suicide.<sup>77</sup> In its concluding paragraphs, the Alaska Supreme Court seems to have absorbed *Vacco*’s worst and best, explaining that while the action-forbearance distinction “is neither perfect nor easily applied in all cases”—yes, these state justices have taken notice of scholarly criticisms of *Vacco*’s teaching, the distinction “has nonetheless shown itself to be sensible and dependable in the vast majority of situations”<sup>78</sup>—yes, despite *Vacco*’s critics, these state justices believe Alaska’s law on assisted suicide, like New York’s, is “entitled to a ‘strong presumption of validity.’”<sup>79</sup>

But suppose, three thousand miles to the west of New York and one hundred and four years later, Holmes’s “reasonable woman” thinks differently about what is and what is not equal. Suppose she and a majority of other voters advance a legal theory that contends not that withholding or withdrawing life-sustaining medical treatment is “nothing more nor less than suicide” (false says *Vacco*),<sup>80</sup> but that physician-assisted dying is not suicide. Even more, suppose a legal theory that not only concedes to the claim that withdrawing or withholding life-sustaining medical treatment and physician-assisted death are different—after all, the former is a liberty interest, the later is not (true says *Vacco*)<sup>81</sup>—but argues that what matters in terms of the

---

73. *Donaldson v. Lungren*, 4 Cal. Rptr. 2d 59, 63 (Ct. App. 1992).

74. *Krischer v. McIver*, 697 So. 2d 97, 102 (Fla. 1997).

75. *Sampson v. State*, 31 P.3d 88, 98 (Alaska 2001).

76. *Id.* at 99.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Vacco v. Quill*, 521 U.S. 793, 807 (1997) (citing *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 280 (1990)).

81. *Id.*

principle of equality is that physician-assisted death is significantly “unlike” assisted suicide, and deserves to be treated “accordingly” by the law.

Next, Washington’s I-1000—together with death with dignity’s emerging conceit.

## II. WASHINGTON’S I-1000: “MOSTLY OLD, SOMETHING NEW”

Washington’s I-1000 was a second attempt to legalize some form of assisted dying;<sup>82</sup> the first, Initiative 119, was rejected by voters in 1991.<sup>83</sup> In all likelihood, I-119 failed because of its lack of safeguards (prominent among them, the absence of psychological evaluations and waiting periods) and the arrogance of its reach (the measure would have decriminalized voluntary euthanasia).<sup>84</sup> For PAD advocates in Washington, then, Oregon’s 1997 voter-approved Death With Dignity Act provided the blueprint to guide framers of Washington’s second bid to legalize this end-of-life option.<sup>85</sup>

From nearly every substantive perspective, I-1000 mirrored Oregon’s.<sup>86</sup> To qualify for a “humane and dignified death,” a patient must be a resident “who is eighteen years of age or older.”<sup>87</sup> The patient must be “competent” (possesses the “ability to make and communicate an informed decision to health care providers”) and dying from a terminal illness (“incurable and irreversible” and will “within reasonable medical judgment, produce death within six months”).<sup>88</sup> An attending and consulting physician must stipulate to the patient’s diagnosis.<sup>89</sup> The patient’s decision to request a lethal prescription “for medication that the qualified patient may self-administer to end his or her life in a humane and dignified manner” must be an “informed” one, a requirement that is met only when the physician conveys “relevant

---

82. Janet I. Tu, “*Death with Dignity*” Act Passes, SEATTLE TIMES, Nov. 5, 2008, available at 2008 WLNR 21128476.

83. *Id.*

84. Andrew M. Jacobs, *The Right to Die Movement in Washington: Rhetoric and the Creation of Rights*, 36 HOW. L.J. 185 (1993); see also Jody B. Gabel, *Release from Terminal Suffering? The Impact of AIDS on Medically Assisted Suicide Legislation*, 22 FLA. ST. U. L. REV. 369 (1994).

85. Rachel La Corte, *State Moves to Implement Assisted-Suicide Law*, SEATTLE TIMES, Nov. 5, 2008, available at [http://seattletimes.nwsourc.com/html/localnews/2008360849\\_webassisted06.html](http://seattletimes.nwsourc.com/html/localnews/2008360849_webassisted06.html).

86. Woodward, *supra* note 5.

87. The Washington Death with Dignity Act, WASH. REV. CODE ANN. § 70.245.010(1) (West 2009).

88. § 70.245.010(3).

89. § 70.245.010(4).

facts” detailing (1) diagnosis, (2) prognosis, (3) risks associated with taking the elixir of death, and (4) alternatives, such as “comfort care, hospice care, and pain control.”<sup>90</sup> Should the patient’s doctors suspect “psychiatric or psychological disorder or depression causing impaired judgment,” the patient must be referred to professional counseling.<sup>91</sup>

The patient’s request “to end her life in a humane and dignified manner” must also be voluntary, and proven in this way: the patient must make two oral requests for a humane and dignified death separated by at least fifteen days, as well as a written request “signed and dated by the patient and witnessed by at least two individuals who . . . attest that the patient is competent, acting voluntarily, and is not being coerced to sign the request.”<sup>92</sup> The attending physician may not be a witness, and “one of the witnesses shall be a person who is not a relative,” or a person who “would be entitled to any portion of the estate of the qualified patient upon death,” or “an owner, operator or employee of a health care facility where the qualified patient is receiving medical treatment or is a resident.”<sup>93</sup> Also required, “at least forty eight hours shall elapse between the date the patient signs the written request and the writing of the prescription. . . .”<sup>94</sup>

Other important provisions of the Act guarantee (1) that the patient “has the opportunity to rescind the request at any time,” (2) that the “attending physician shall recommend that the patient notify next of kin,” and (3) that “a person shall not be subject to civil or criminal liability or professional disciplinary action for participating in good faith compliance with the [Act].”<sup>95</sup>

Finally, as if to remind voters that a distinction with a difference punctuates the 1991 and 2008 initiatives, the very limited reach of the I-1000 version is repeated frequently: qualified death-with-dignity patients must “self-administer” medications to hasten death, making “lethal injection, mercy killing, or active euthanasia” strictly forbidden.<sup>96</sup>

Is Washington’s I-1000 a carbon copy of Oregon’s? No. Washington’s addresses “competent” adults,<sup>97</sup> Oregon’s, “capable”<sup>98</sup>—

90. § 70.245.010(7).

91. § 70.245.010(6).

92. § 70.245.010(3).

93. The Washington Death with Dignity Act, § 70.245.030(2).

94. § 70.245.110(2).

95. § 70.245.040(1)(h); § 70.245.080; § 70.245.190(1)(a).

96. §§ 70.245.170-180.

97. § 70.245.010(3).

even though both definitions are identical. Among ways to prove residency, Oregon permits “a tax return,”<sup>99</sup> Washington does not.<sup>100</sup> Perhaps to insulate Washington’s Initiative from the outer boundaries of Congress’ Commerce Clause power, Washington’s language warns that “medications dispensed pursuant [to the Act] shall not be dispensed by mail or other form of courier”;<sup>101</sup> Oregon’s law, drafted prior to challenges by the Bush Administration to control the purposes for which drugs are dispensed, permits the patient to “deliver the written prescription personally or by mail,” and is silent about the manner by which drugs are dispensed.<sup>102</sup> As for reporting requirements, Washington’s I-1000 requires that “the department of health shall annually review all records maintained under [the Act];”<sup>103</sup> Oregon’s law only requires that the state “annually review a sample of records maintained pursuant [to the Act].”<sup>104</sup>

Similarities? Many. Minor differences? A few. Dramatic departures? One. Although both Oregon and Washington laws stipulate that “[a]ctions taken in accordance [with the law] shall not, for any purpose, constitute suicide or assisted suicide,”<sup>105</sup> Washington’s requires more: in Section 4, “Attending Physician Responsibilities,” the law mandates that “the attending physician may sign the patient’s death certificate which shall list the underlying terminal disease as the cause of death.”<sup>106</sup> Oregon’s law contains no such mandate and only in regulations promulgated by the state’s Department of Human Services does one find language that merely “suggests physicians record the underlying terminal conditions as the cause of death . . . rather than recording that the patient ingested a lethal dose of medications prescribed under DWDA.”<sup>107</sup>

During the 2008 election season, to be sure, proponents and opponents of Washington’s Initiative hammered away at arguments thoroughly familiar to Oregonians who had debated them not once but twice; Measure 16 legalizing death with dignity in 1994, and Measure

---

98. The Oregon Death with Dignity Act, OR. REV. STAT. ANN. § 127.800 s.1.01(3) (West 2009).

99. § 127.865 s. 3.11(4).

100. The Washington Death with Dignity Act, § 70.245.

101. § 70.245.040(l)(ii)(B).

102. The Oregon Death with Dignity Act, § 127.815 s. 3.01(l)(B)(ii).

103. The Washington Death with Dignity Act, § 70.245.150(1)(a).

104. The Oregon Death with Dignity Act, § 127.865 s. 3.11(1)(a).

105. The Washington Death with Dignity Act, § 70.245.180(1).

106. § 70.245.040.

107. § 70.245.040 (2).

51, an unsuccessful repeal initiative, in 1997.<sup>108</sup> Predictably, proponents argued from the perspective of the relatively few terminally ill, competent adults who suffer unbearable pain: for patients for whom the “alleviation of pain is truly difficult or impossible,”<sup>109</sup> end-of-life options in the absence of PAD are limited to terminal or palliative sedation—“an induced coma . . . for the week or ten days it takes for dehydration and starvation to bring about death.”<sup>110</sup> For some repulsed by “slow euthanasia,” the opportunity to choose the time, place, and manner of one’s death provided by PAD was a comforting, “least worst” option. Familiar, too, were the arguments against physician-assisted suicide, among these: (1) financial and insurance pressures to choose a “cheap” death,<sup>111</sup> (2) transforming doctors into killers,<sup>112</sup> (3) morphing the right to die into a duty, particularly for those with disabilities,<sup>113</sup> and, of course, (4) the Netherlands’ fall into the disgrace of euthanasia.<sup>114</sup>

New to the mix, Washington’s debate also scrutinized Oregon’s ten-year experience with legalized death with dignity. For proponents, the evidence demonstrated that the law was infrequently used and without abuse; said Booth Gardner, a key proponent and a Parkinson’s sufferer who served two terms as Washington’s Governor, Oregon’s record proves “that all the horrible things that the fear-mongers said would happen haven’t happened.”<sup>115</sup> Opponents interpreted the data differently, arguing that the practice of “physician-assisted suicide”

---

108. Kathryn L. Tucker, *Choice at the End of Life: Lessons from Oregon*, AM. CONST. SOC’Y FOR LAW & POL’Y, June 17, 2008, at 4, available at <http://www.acslaw.org/files/Kathryn%20L.%20Tucker%20Issue%20Brief.pdf> [hereinafter *Lessons from Oregon*].

109. Kathryn L. Tucker, *The Chicken and the Egg: The Pursuit of Choice for a Human Hastened-Death as a Catalyst for Improved End-of-Life Care; Improved End-of-Life Care as a Precondition for Legalization of Assisted Dying*, 60 N.Y.U. ANN. SURV. AM. L. 355 (2004).

110. *Lessons from Oregon*, supra note 108, at 4.

111. KENNETH CAUTHEN, *PHYSICIAN ASSISTED SUICIDE AND EUTHANASIA* (C.S.S. Pub. Co. 1997).

112. Jennifer L. Hanscom, *As I-1000 Signatures are Counted, Washington State Medical Association Opposition to Physician-Assisted Suicide Reiterated*, PR NEWSWIRE, July 2, 2008, available at [http://www.wsma.org/files/Downloads/NewsEvents/PressReleases/pr\\_I1000\\_%20release.pdf](http://www.wsma.org/files/Downloads/NewsEvents/PressReleases/pr_I1000_%20release.pdf).

113. *Lessons from Oregon*, supra note 108, at 8.

114. Paula Ranney, *Assisted Suicide I-1000 is a Bad Idea*, KITSAP SUN, Oct. 2, 2008, <http://www.kitsapsun.com/news/2008/oct/02/paula-ranney-guest-column-assisted-suicide-is/>.

115. Stuart Glascock, *Washington’s Right-to-Die Battle is Personal*, L.A. TIMES, June 22, 2008, <http://articles.latimes.com/2008/jun/22/nation/na-righttodie22>.

needed more “sunlight.”<sup>116</sup> Opponents also heralded a study published in the *British Medical Journal* claiming to have demonstrated that some Oregonians who choose death with dignity “may be clinically depressed.”<sup>117</sup> On that point, proponents countered, the application of standardized measures of depression on otherwise healthy people generates false readings from patients suffering intractable pain.<sup>118</sup>

The Initiative’s “cause of death” language, however, was novel, and pregnant with potentially enormous consequence: “If Compassion and Choices of Washington wins the battle of language,” said one critic, “it will have won.”<sup>119</sup> Indeed, as early as March 2008, opponents mounted a legal challenge to the language used to describe the Initiative in the state’s official ballot summary, hoping that “suicide” would be inserted to educate the voters better about the true nature of the Initiative.<sup>120</sup> Not to be, said the presiding judge: suicide “is a somewhat loaded term” that could cloud the debate with images of Michigan’s “Dr. Death.”<sup>121</sup> Protestations notwithstanding, the ballot language stood: “This measure would permit terminally ill, competent, adult Washington residents, who are medically predicted to have six months or less to live, to request and self-administer lethal medication prescribed by a physician.”<sup>122</sup>

The Initiative’s cause of death clause inspired a fiery and tense state-wide debate, as the following sample comments indicates. “People ought to be really wary when somebody wants to redefine the English language. By definition, [death with dignity patients] are killing themselves. To say it is the underlying disease is disingenuous and dishonest.”<sup>123</sup> “To my knowledge, there’s no other situation in medicine in which the death certificate is deliberately falsified—and in which this falsification is mandated by law.”<sup>124</sup> “The Initiative seeks to re-label the process with euphemisms designed to eradicate the term

---

116. Bob Caldwell, Editorial, *Washington State’s Assisted-Suicide Measure: Don’t Go There*, THE OREGONIAN, Sept. 20, 2008, [http://www.oregonlive.com/opinion/index.ssf/2008/09/washington\\_states\\_assistedsuic.html](http://www.oregonlive.com/opinion/index.ssf/2008/09/washington_states_assistedsuic.html).

117. Don Colburn, *OHSU Study Finds Patients Who Choose Physician-Assisted Suicide May Be Clinically Depressed*, THE OREGONIAN, Oct. 7, 2008, [http://www.oregonlive.com/news/index.ssf/2008/10/ohsu\\_study\\_finds\\_depression\\_in.html](http://www.oregonlive.com/news/index.ssf/2008/10/ohsu_study_finds_depression_in.html) [hereinafter *OHSU Study*].

118. *Id.*

119. Don Colburn, *Washington Coalition Files Suicide Initiative*, SEATTLE TIMES, Mar. 2, 2008, at B7.

120. *Id.*

121. Richard Roesler, *No “Suicide” Label on Initiative*, SEATTLE TIMES, Mar. 2, 2008, at B7, [http://seattletimes.nwsourc.com/html/localnews/2004254545\\_initiative02.html](http://seattletimes.nwsourc.com/html/localnews/2004254545_initiative02.html).

122. *Id.*

123. Glascock, *supra* note 115.

124. Hanscom, *supra* note 112.

‘suicide.’”<sup>125</sup> “Recognizing that all social engineering is preceded by verbal engineering, they’ve sanitized the language. The ‘s-word’ is out.”<sup>126</sup> “Painting stripes on a donkey won’t make it behave like a zebra. Changing the language is deceptive and will only delude us into denying the reality of a violent end.”<sup>127</sup>

For some critics, removing suicide from the cause of death amounted to nothing more than a political calculation designed to improve the Initiative’s acceptance among voters; that death with dignity polls better without suicide terminology is a well-established fact.<sup>128</sup>

That said, death with dignity advocates viewed physician-assisted dying as a value-neutral term, and pointed to other reasons for striking suicide from the certificate of death. Particularly important in this regard was the growing acceptance among some professional organizations that assisted suicide terminology was not an accurate description of death with dignity’s end-of-life option. The American Academy of Hospice and Palliative Medicine, for one, contends that for terminally ill, competent adults whose pain cannot be controlled by pharmacological interventions, “a lethal medication that the patient can take by his own hand to end otherwise intolerable suffering” is not suicide.<sup>129</sup> Other groups similarly inclined include the American Medical Women’s Association, and the Coalition of Mental Health Professions.<sup>130</sup>

Underlying this developing view is the belief that “profound psychological differences distinguish suicide from actions under [Oregon’s] Dignity Act.”<sup>131</sup> According to James Lieberman, frequently quoted on this issue, “the term ‘assisted suicide’ is inaccurate and misleading with respect to the DWDA. Those patients and the typical

---

125. Gerald Yorioka, Letter to the Editor, SEATTLE TIMES, July 24, 2008, [http://seattletimes.nwsourc.com/html/opinion/2008069367\\_thursletters24.html](http://seattletimes.nwsourc.com/html/opinion/2008069367_thursletters24.html).

126. Rita L. Marker, *Suicide as a Medical Treatment*, INTERNATIONAL TASKFORCE, <http://www.internationaltaskforce.org/washsat.htm> (last visited Sept. 4, 2009).

127. Ranney, *supra* note 114.

128. David W. Moore, *Three in Four Americans Support Euthanasia*, GALLUP NEWS SERVICE, May 17, 2005, available at <http://www.gallup.com/poll/16333/three-in-four-americans-support-euthanasia.aspx>.

129. American Academy of Hospice and Palliative Medicine, *Position Statement: Physician-Assisted Death*, Feb. 14, 2007, available at <http://www.aahpm.org/positions/suicide.html>.

130. See generally *Lessons from Oregon*, *supra* note 108, at 2.

131. Kathryn L. Tucker, Letter to the Editor, J. OF PALLIATIVE MED., July 13, 2009, <http://www.liebertonline.com/doi/abs/10.1089/jpm.2009.9599>.

suicides are opposites. . . .”<sup>132</sup> Among the differences, notes Lieberman: (1) “The suicidal patient has no terminal illness but wants to die; the DWDA patient has a terminal illness and wants to live”; (2) “Suicides bring shock and tragedy to families and friends; DWDA deaths are peaceful and supported by loved ones”; (3) “[S]uicides are secretive and often impulsive and violent. Death in DWDA is planned . . . ;” (4) “Suicide is an expression of despair and futility; DWDA is a form of affirmation and empowerment.”<sup>133</sup>

And riding this sea change, after eight years of data collection documenting physician-assisted suicide in Oregon, the state’s Department of Human Services jettisoned the term. Beginning with Oregon’s ninth report issued in March 2007, the State now speaks only of the death with dignity option.<sup>134</sup>

Thus, death with dignity’s emerging conceit: physician-assisted death, aid-in-dying, death with dignity, assisted dying, assisted death, physician-assisted dying, hastened death, patient-directed death—“just don’t call it suicide.”<sup>135</sup> If, in fact or opinion—Frankfurter’s language<sup>136</sup>—this evolution of terminology gains more wide-spread, popular traction, could judicial strategies for advancing the cause of PAD work this emerging conceit into a more powerfully persuasive argument in state, possibly federal, courts? On the equal protection grounds this Article proposes, such an argument could be appealing.

### III. “ES IST GENUG!”<sup>137</sup>

From a 1977 article of his that appeared in the *Harvard Law Review*, Justice William Brennan, Jr., is credited with having prompted state court judges to broaden the prophylactic scope of the state freedoms of state citizens on state constitutional grounds—freedoms

---

132. Lieberman, E.J., M.D., *Letters to the Editor, Death with Dignity*, 41 *PSYCHIATRIC NEWS* 29, (2006), available at <http://pn.psychiatryonline.org/cgi/content/full/41/15/29>.

133. *Id.*

134. OREGON’S DEATH WITH DIGNITY ACT - 2006 (2007), <http://egov.oregon.gov/DHS/ph/pas/docs/year9.pdf>.

135. Carol M. Ostrom, *Just Don’t Call it Suicide, Initiative Backers Say*, *THE SEATTLE TIMES*, Jan. 9, 2008, [http://seattletimes.nwsourc.com/html/localnews/2004115054\\_death09m.html](http://seattletimes.nwsourc.com/html/localnews/2004115054_death09m.html).

136. *Tigner v. Texas*, 310 U.S. 141, 147 (1940) (“The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.”).

137. JOHANN SEBASTIAN BACH, *Es Ist Genug* [It is Enough] on O EWIGKEIT, DU DONNERWORT (1723).

beyond those “national minimum standards” established during the years of the Warren Court.<sup>138</sup> As Brennan would express it:

[S]tate courts no less than federal are and ought to be the guardians of our liberties. . . . The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.<sup>139</sup>

According to Robert F. Williams, Brennan-inspired “New Judicial Federalism”<sup>140</sup> took hold in the early 1970s;<sup>141</sup> this in part “reflects attempts by state courts independently to interpret the meaning of cognate textual provisions.”<sup>142</sup> Since that time, state judges, once “mesmerized” by holdings of the High Court, “have granted expansive protection under their state constitutions in a variety of areas,”<sup>143</sup> including substantive and procedural freedoms otherwise provided for in the Bill of Rights.<sup>144</sup> On matters of equal protection, notes Jeffrey M. Shaman, “at least twenty-one states have ruled that the equality guarantees in their state constitutions afford more expansive protection than the Federal Equal Protection Clause.”<sup>145</sup> That number—at a minimum—has increased to twenty-four in light of future-oriented decisions by the state supreme courts of Massachusetts, California, and Connecticut who have broken new state constitutional ground in cases that challenge prohibitions on same-sex marriage.<sup>146</sup>

---

138. See William J. Brennan, Jr., *State Constitutions and the Protections of Rights*, 90 HARV. L. REV. 489, 502 (1977); see also James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 762-63 (1992) (noting that Justice Brennan’s article had a profound effect on the view of state constitutionalism).

139. Brennan, Jr., *supra* note 138, at 491.

140. Robert F. Williams, *Introduction: The Third Stage of the New Judicial Federalism*, 59 N.Y.U. ANN. SURV. AM. L. 211, 211 (2003).

141. Shaman, *supra* note 37, at 1019.

142. Williams, *supra* note 140, at 223 (citing Lawrence Friedman, *The Computational Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 97 (2000)).

143. Shaman, *supra* note 37, at 1019.

144. *Id.* at 1020.

145. *Id.* at 1021.

146. See *In re Marriage Cases*, 138 P.3d 384 (Cal. 2008); see also *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

Given the canon of New Judicial Federalism, *Baxter v. State's*<sup>147</sup> holding that qualified patients are endowed with a fundamental state constitutional right to physician-assisted dying<sup>148</sup> seems strangely schizophrenic. On the one hand, its expansive interpretation of state privacy and dignity rights reads like the latest and best example from the “world according to” New Judicial Federalism; on the other, its equal protection analysis follows “the federal model of equal protection in virtual lockstep with the doctrine set forth by the United States Supreme Court.”<sup>149</sup> The *Baxter* court took a wrong turn in holding that state equal protection guarantees do not embrace terminally ill, competent adults who seek PAD; for that reason, the *Baxter* court missed a cutting edge opportunity to integrate death with dignity’s emerging conceit into an equal protection argument that could have settled on judicial grounds what the voters in Oregon and Washington have settled on legislative grounds.

No one can deny the significance of Judge McCarter’s *Baxter* ruling: hers is the first among all our nation’s state judges to elevate PAD to a fundamental right. Having done so, Montana law could have only trumped that fundamental right if the state could have proven that the interests it asserts (1) are “compelling,” and that its law (2) is “narrowly tailored” to the achievement of those interests.<sup>150</sup> Judge McCarter’s “interest” assessment:

It is easy to acknowledge the State’s interest in preserving human life in general, but it is difficult to imagine a compelling interest in preserving the life of an individual who is suffering pain and the indignity of his disease; whose life is going to end within a relatively short period of time; and for whom palliative care is inadequate to satisfy his personal desire to die with dignity.<sup>151</sup>

For this reason, ruled Judge McCarter, “the competent terminal patient’s rights of privacy and dignity overcome the State’s general interest in preserving human life.”<sup>152</sup>

---

147. *Baxter v. State*, No. ADV-2007-787, 2008 WL 6627324 (Mont. 1st Dist. Dec. 5, 2008).

148. *Id.*

149. Shaman, *supra* note 37, at 1029.

150. *Baxter*, 2008 WL 6627324.

151. *Id.*

152. *Id.*

However significant her ruling is on substantive grounds, its potential impact beyond Montana would seem trivial at best: few state constitutions enumerate substantive privacy and/or dignity rights, and in those states that do, state judges have rejected appeals to recognize PAD rights.<sup>153</sup>

Judge McCarter's interpretive wrong turn on equal protection grounds actually unfolds from the fundamental nature of the right she attributes to PAD. Judge McCarter rejects an equal protection guarantee for terminally ill, competent patients not dependent on life-sustaining medical equipment for precisely the same reasons laid out in *Vacco*,<sup>154</sup> except those reasons do not fit *Baxter's* set of circumstances. In *Vacco*, because New York's prohibition against assisted suicide did not burden any fundamental right, state law that distinguished terminally ill patients tethered to life support from those who were not, did not violate the Equal Protection Clause since that distinction made sense to the reasonable man.<sup>155</sup> But *Vacco* and *Baxter* are not alike and should have been treated accordingly. Since *Baxter*, not *Vacco*, announces that PAD is a fundamental right, the equal protection issue that was generated in *Baxter* should have triggered not *Vacco's* reasonable man, but *Baxter's* "compelling governmental interest/narrowly tailored" calculus.<sup>156</sup> If, in this way, Judge McCarter had asked whether Montana could show compelling reasons to justify dissimilar treatment between those who refuse medical treatment and those that seek a lethal drug, surely her answer would have been the same one she capably argued to deny that Montana advanced a compelling governmental interest necessary to justify burdening a fundamental right to PAD. Under the exceedingly unforgiving strict scrutiny that the burdening of a fundamental right would have triggered, the causation-based and intent-based distinctions between "letting die" and "killing," or "forbearance" and "action" would, as Stephen D. Smith contends, "wilt[] under examination."<sup>157</sup>

Of course, Judge McCarter's interpretive wrong turn was a harmless error, at least for PAD advocates who nonetheless prevailed on

---

153. See *Krischer v. McIver*, 697 So.2d 97 (Fla. 1997); *Donaldson v. Lungren*, 4 Cal. Rptr. 2d 59 (Cal. Ct. App. 1992); *Sampson v. State*, 31 P.3d 88 (Alaska 2001).

154. *Baxter*, 2008 WL 6627324.

155. *Vacco v. Quill*, 521 U.S. 793, 793–99 (1997).

156. *Baxter*, 2008 WL 6627324.

157. Smith, *supra* note 65, at 1576.

substantive grounds;<sup>158</sup> and one can only imagine that the appeal of McCarter's decision to Montana's Supreme Court will turn on her bold interpretation of rights, not her *Vacco*-ready analysis of equal protection. Harmless, too, in other states where in the absence of enumerated privacy and/or dignity rights, *Vacco*'s teaching provides serviceable answers to equal protection controversies when comparing classes of terminal patients either connected or not connected to life-support systems.

But must *Vacco* remain serviceable? Could *Vacco* be losing its appeal? Consider the possibilities. Albeit in a variety of ways, to reiterate, all state constitutions provide some kind of meaningful equal protection guarantees.<sup>159</sup> Thus, for all states other than Oregon and

158. InternationalTaskForce.org, *One Judge's Ruling Makes Assisted Suicide Instantly Legal in Montana*, <http://www.internationaltaskforce.org/iaa47.htm> (last visited Nov. 20, 2009).

159. ALA. CONST. art. I, § 1; ALASKA CONST. art. I, § 1; ARIZ. CONST. art. II, § 13; ARK. CONST. art. II, § 3; CAL. CONST. art. I, § 7; CONN. CONST. art. I, § 1; DEL. CONST. art. I, § 7; FLA. CONST. art. I, § 2; GA. CONST. art. I, § 1, ¶ 2; HAW. CONST. art. I, § 5; IDAHO CONST. art. I, § 13; ILL. CONST. art. I, § 2; IND. CONST. art. I, § 23; IOWA CONST. art. I, § 6; KAN. CONST. art. I, §§ 1-2; KY. CONST. art. I, § 2; LA. CONST. art. I, § 3; ME. CONST. art. I, § 6-A; MASS. CONST. art. CVI; MICH. CONST. art. I, § 2; MO. CONST. art. I, § 2; MONT. CONST. art. II, § 4; NEB. CONST. art. I, § 3; NEV. CONST. art. IV, § 21; N.H. CONST. part I, art. 2, 12; N.M. CONST. art. II, § 18; N.Y. CONST. art. I, § 11; N.C. CONST. art. I, § 19; OHIO CONST. art. I, § 2; OR. CONST. art. I, § 20; R.I. CONST. art. I, § 2; S.C. CONST. art. I, § 3; S.D. CONST. art. VI, § 26; TENN. CONST. art. I, §§ 8, 17; TEX. CONST. art. I, § 3; UTAH CONST. art. I, § 2; VA. CONST. art. I, §§ 1, 11; WASH. CONST. art. I, § 12; W. VA. CONST. art. I, §§ 1, 17; WIS. CONST. art. I, § 1; WYO. CONST. tit. 97, art. I, §§ 2-3; *R. McG. v. J.M.*, 615 P.2d 666, 670 n.7 (Colo. 1980) (citing *Vanderhoof v. People*, 380 P.2d 903 (Colo. 1963); *Trueblood v. Tinsley*, 366 P.2d 655 (Colo. 1961); *People v. Max*, 198 P. 150, 156 (Colo. 1921)) (stating that Equal Protection is a constitutionally recognized right included within the Due Process Clause of Article II, Section 25 of the Colorado Constitution); *Hornbeck v. Somerset Bd. of Educ.*, 458 A.2d 758, 781 (Md. 1983) (stating that Art. 24 of the Colorado Constitution and the Equal Protection Clause of the Federal Constitution "*pari materia* and generally apply in like manner and to the same extent . . ."); *Katz v. Katz*, 408 N.W.2d 835, 842 n.4 (Minn. 1987) (stating that "[a]lthough no clause in the Minnesota Constitution resembles the federal [E]qual [P]rotection [C]ause, Minn. Const. art. 1, § 2 provides 'No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers.' Generally, during its history this court has treated this state clause as analogous to the federal equal protection clause in the fourteenth amendment."); *Miss. Unemployment Comp. Comm'n*, 4 So.2d, 684 (Miss. 1941) (stating that equal protection is guaranteed by Section 14 of the Mississippi Constitution); *Greenberg v. Kimmelman*, 494 A.2d 294, 302 (N.J. 1985) (stating that while Article I, paragraph 1 of the New Jersey Constitution does not use the phrase "Equal Protection," it still seeks to "protect against injustice and against the unequal treatment of those who should be treated alike. To this extent, article 1 safeguards values like those encompassed by the principles of due process and equal protection."); *Mund v. Rambough*, 432 N.W.2d 50, 54-55 n.4 (N.D. 1988) ("The North Dakota Constitutional provision guaranteeing equal protection of the laws is Article I, Section 21 . . ."); *Fair Sch. Fin. Council v. State*, 749 P.2d 1135, 1148 n.48 (Okla. 1987)

Washington—not excepting Montana unless Judge McCarter’s “rights” ruling is sustained—PAD advocates can avail themselves of opportunities to advance equal protection claims centered on death with dignity’s emerging conceit: physician-assisted dying is not suicide. Plausible, too, is the view that the conceit emerged centuries ago only to have re-emerged in our age in response to debates over the legalization of Oregon-Washington styled death with dignity; consider in this regard the enduring, other worldly music and text from Johann Sebastian Bach’s 60<sup>th</sup> Cantata: “It is enough! Lord, when it pleases Thee, Relieve me of my yoke!”<sup>160</sup>

For what purpose this emerging conceit? If physician-assisted dying is not suicide, whether true in fact or opinion, comparisons between that class of terminally ill, competent adults dependent upon life-sustaining medical treatment and that class of terminally ill, competent adults not similarly dependent, would be abandoned; in its place, a comparison between that class of not terminally ill persons that seeks suicide assistance, and that class of terminally ill, competent adults that seeks a humane and dignified death—death with the assistance of a physician. If the distinction between these reconstituted classes makes sense to reasonable women and men, then surely a state law that treats both classes as like cases could be voided on equal protection grounds, and by state court judges not only emboldened by the independence of New Judicial Federalism, but by the reasonable nature of death with dignity’s emerging conceit.

---

(stating that the Due Process Clause of the Oklahoma Constitution, Article 2, § 7, functions as the “same [E]qual [P]rotection component” as the fourteenth amendment of the United States Constitution); *Laudenberger v. Port Auth.*, 436 A.2d 147, 155 n.13 (Pa. 1981) (citing *Baltimore & Ohio R.R. Co. v. Dept. of Labor and Indus.*, 334 A.2d 636 (Pa. 1975)) (“Appellees’ contentions concerning the Equal Protection Clause of the federal Constitution and Art. III, § 32 of the Pennsylvania Constitution may be reviewed simultaneously, for the meaning and purpose of the two are sufficiently similar to warrant like treatment.”); *In re Eddy’s Estate*, 380 A.2d 530, 534 (Vt. 1977) (stating that ch. 1, art. 9 of Vermont’s Constitution, the “proportional contribution clause is the practical equivalent of the [E]qual [P]rotection [C]lause of the Fourteenth Amendment of the United States Constitution”).

160. BACH, *supra* note 137.