damages typically involve economic injuries that are not large enough to support an individual lawsuit.

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counter the typical defense arsenal.

The 1966 court reform that gave birth to modern federal class actions recognized that our legal system should provide remedies in such situations. Nonetheless, it has had its adversaries—as tends to happen when reform empowers people who could not, individually, afford to retain representation.

When Foes Become Friends

Ironically, these same detractors can become class actions' greatest supporters when the benefits are recognized. because it was highly complex and complicated by unidentified future claims. Consequently, the decision should pose no threat to most cases. Class actions will continue to provide Americans with access to the courts—something that is the envy of people throughout the world.

CIVIL LIBERTIES *By Harvey A. Silverglate*

The End of Life Is Not a Special-Interest Issue

THOSE HOPING the Supreme Court would add physician-assisted suicide to the intimate rights of "personal autonomy" protected by the due process clause were perhaps surprised to find that not one justice accepted the notion.

Indeed, Chief Justice William H. Rehnquist dismissed this point of contention between so-called strict constructionists and judicial activists in a single sentence: "That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected."

Over the years, the court has elevated to constitutionally protected status such rights as abortion, contraception and racial intermarriage. The claimed right to physician-assisted suicide did not measure up. Why? Critics ask whether the court, wearied by the firestorm that the 1973 abortion decision wrought, this time sacrificed consistency for peace, relegating this contentious debate to the political arena. Such a disposition, cynics might argue, mocks stare decisis and chooses between political constituencies in the allocation of constitutional rights.

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Such, however, may not be the case.

The issue arose in two cases—from the 2d Circuit (*Vacco and Quill v. Attorney General of New York*) and the 9th Circuit (*Washington v. Glucksberg*). The plaintiffs were physicians seeking to help terminally ill, suffering patients end their lives with dignity. In each case, albeit on somewhat different doctrinal bases, the courts of appeals concluded that the right was worthy of constitutional protection. This position did not attract a single vote on the Supreme Court, although in separate concurring opinions five of the justices held open the door for a compelling case, should it arise.

Nonetheless, the failure of abortion, birth control, racial intermarriage and other precedents to influence, much less control, the outcome in the assisted suicide arena startled some observers. A possible explanation is hinted by Justice Sandra Day O'Connor: "Death will be different for each of us. For many, the last days will be spent in physical pain and perhaps the despair that accompanies physical deterioration and a loss of control of basic bodily and mental functions. Some will seek medication to alleviate that pain and other symptoms."

Personally Based Legislation

Justice O'Connor was reminding us that death is universal. Legislators and electorates who make the decisions on assisted suicide are voting on laws that can readily—and unpredictably—govern the twilights of their own lives and those of their loved ones. This is one area where the legislative and referendum processes should, in theory, work best, since those making laws can rest assured that they will live (and die) under the same rules that they establish for others.

During the legislative and court battles leading to the *Roe v. Wade* abortion rights victory, women's rights advocates observed with dark humor that "if men could become pregnant, abortion would be a sacrament." Given the universality of old age, illness and death, while assisted suicide may never become a sacrament, there is a chance that, in some states at least, the rules will ease, albeit with sufficient protections to avoid the widely feared "slippery slope."

As lawmakers recognize that when they "do unto others" they are inevitably "doing unto themselves" as well, the "golden rule" is likely to produce sensitive and nonhypocritical accommodations. No minority rights are likely to be trampled by majoritarian legislatures, since there are no minorities here: We all face disability, pain and death. For this reason, the opposing camps, and legislators that represent them, are likely to devise an accommodation the judiciary is not suited to impose by fiat.

In fact, physicians and patients have already been shaving the rough edges of laws that strictly criminalize assisted death, and legislators and prosecutors have not jumped in. As most of the justices observed, there is a widely tolerated practice by which physicians provide terminal patients with what Chief Justice Rehnquist delicately labeled "aggressive palliative care" in which "painkilling drugs may hasten a patient's death" but are lawful because "the physician's purpose and intent is, or may be, only to ease his patient's pain."

Those who wanted the court to announce a new personal autonomy right of assisted suicide might be disappointed, but, given the complexities of life and death, it might be the better part of both valor and wisdom that the court ignored the precedents on contraception, intermarriage and abortion, and let us mere mortals muddle through on this one.

Page A24-25

- William J. Brennan Jr., champion of due process
- ABA will consider important pay-to-play resolution.