Suicide, Law and Morality

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For the past several decades, American policy makers and judges have been grappling with the closely related issues of assisted suicide and euthanasia. These issues gain drama from the permanence and terror that accompanies the end of life. They gain poignancy from the fact that unlike capital punishment—another purposeful termination of life but one which potentially affects only a small number of society’s most reprehensible people—the laws governing assisted suicide and euthanasia potentially affect us all as we head toward the decrepitude that so often accompanies our final years. Emotions run high on these subjects, making them unusually difficult to resolve, and the complex imbrications of ethical, metaphysical and jurisprudential theories that address them often add confusion rather than providing clarity.

This article is directed to the question of assisted suicide, and specifically to the constitutionality of laws prohibiting that practice. The Supreme Court has addressed this issue several times over the past few decades. In Cruzan v. Director, Missouri Department of Health, 1 the Court held that due process clause provides people with

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a constitutional right to refuse life-saving medical treatment. But soon thereafter, in *Washington v. Glucksburg* \(^2\) and *Vacco v. Quill*, \(^3\) the Court held that neither the due process clause nor the equal protection prohibition precludes states from making it a crime to assist a person in committing suicide. Most recently, in *Gonzales v. Oregon*, \(^4\) the Court invalidated a Bush administration effort to preempt the state of Oregon’s Death With Dignity Act, which authorizes physicians to provide lethal drugs to adults suffering from an incurable disease. \(^5\) The *Gonzales* decision, quite properly, does not address the constitutional issues, since the question that was raised involved the statutory authority of the Attorney General to preempt state law. \(^6\) But the majority opinion and the two dissents display a skittishness about the subject of assisted suicide that lies just below the legal surface of the case. Thus *Gonzales*, when viewed in conjunction with the recent events surrounding Terry Schiavo’s death \(^7\) and the prosecution of Dr. Jack Kevorkian \(^8\), indicates that the question of assisted suicide is likely to occupy a central place in public discourse for a considerable time.

The doctrine that the Supreme Court has fashioned in this area is not particularly unstable; there is certainly a recognizable difference between terminating life support and affirmatively causing

\(^2\) 521 U.S. 702 (1997);
\(^3\) 521 U.S. 793 (1997). The two cases were decided the same day. For an extensive discussion of these cases, see Melvin Urofsky, *Leaving the Door Ajar: The Supreme Court and Assisted Suicide*, 32 U. Richmond L. Rev. 313 (1998)
death. But the rationale behind these two actions is sufficiently similar to raise questions about the conceptual coherence of the Court’s approach. At the pragmatic level, both involve efforts by physicians to provide terminally ill patients with a dignified and painless death. At the theoretical level, which extends beyond the terminally ill, both are based on the idea that people should have the right to decide whether they want to go on living, and that those who truly choose to die, for whatever reason, should not be prevented from obtaining assistance in implementing their decision.

The most commonly stated legal rationale for arguing that the Constitution grants people such a right is the so-called a right to die, which is grounded on either substantive due process or the right of privacy, that is, the penumbra of the first eight amendments. The Court employed this rationale in *Cruzan*, and rejected it in *Glucksberg*. This article does not revisit those decisions. Substantive due process and the right of privacy, which may or may not be the same thing, are such troubled and vaguely defined doctrines that they seem to obscure, rather than illuminate, the

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12. The companion case, *Vacco*, rejected the less common argument that laws against assisted suicide violate the equal protection clause. The Court had little difficulty concluding that the Equal Protection Clause creates no substantive rights and that no suspect classification was involved. 521 U.S. at 799.

underlying moral issues on which decisions regarding human rights ultimately rest. 14

Instead, this article adopts a different approach. It argues that the intense controversy about assisted suicide and the related issue of terminating life support reflects the conflict between two moral systems, one traditional and the other evolving. It further argues that because one of these conflicting systems is religiously based, any governmental action that favors this morality over its rival violates the Establishment Clause. There have been previous efforts to use the Establishment Clause in place of substantive due process or the right of privacy, most notably in dealing with the issue of abortion. 15

These arguments, however, suffer from well-recognized conceptual defects, 16 and more seriously, it will be argued, are non-historical. The argument in this article is based on the specific historical experience of Western civilization, the idea that in our society, at the present time, laws against assisted suicide in fact are efforts to take sides in an ongoing controversy and impose a religiously-based morality on those who would otherwise choose an alternative approach.

Part I explores the relationship between systems of morality and views of suicide, tracing the changes in Western culture from a morality of honor to a morality of higher purposes to a morality of self-fulfillment. It further discusses the connection between the morality of higher purposes and the Christian religion. Part II summarizes Establishment Clause doctrine, and shows how laws against suicide or assisted suicide represent a choice of the Christian-based morality of higher purposes, and are thus unconstitutional according to this doctrine.

I. MORALITY AND SUICIDE

While nothing is more universal or ineluctable than death, nothing is more culture-dependent or avoidable than suicide. The patterns of suicide and attitudes toward suicide exhibit wide gyrations from one society to another and from one era to another in the same society. Consequently, the study of suicide provides a window into one of the most disconcerting but significant aspects of human culture, namely, the malleability of moral attitudes. As we look back over

15. Dworkin, supra note [ ], at 98-110; Lawrence Tribe, The Supreme Court, 1972 Term: Foreword: Toward a Model of Roles in the Due Process of Life and Law, 87 Harv. L. Rev. 1, 21-25 (1973)
16. See pp. [ ], infra.
three millennia of Western civilization, the variation in these patterns and attitudes betoken changes in our society’s most basic conceptions of good and bad, right and wrong.

The attitudinal gyrations that characterize Western attitudes toward suicide can be illustrated by three quotations, three snapshots from a long, complex tradition. The first is from Plutarch, the second-century moral philosopher. Among his many works are the Parallel Lives, biographies of famous Greeks and Romans, arranged in pairs and designed to teach moral lessons by positive and negative example.¹⁷  Plutarch pairs Demosthenes, the fiery Athenian orator, with Cicero, the urbane Stoic orator and philosopher.¹⁸  In their later years, both men found themselves in the power of their enemies and under sentence of death. Comparing their responses to this situation, Plutarch writes:¹⁹

Cicero’s death excites our pity; for an old man to be miserably carried up and down by his servants, flying and hiding himself from that death which was, in the course of nature, so near at hand; and yet at last to be murdered. Demosthenes, though he seemed at first a little to supplicate, yet, by his preparing and keeping the poison by him, demands our admiration; and still more admirable was his using it. When the temple of the god no longer afforded him a sanctuary, he took refuge, as it were, at a mightier alter, freeing himself from arms and soldiers, and laughing to scorn the cruelty of Antipater.

Some twelve centuries later, Dante placed all suicides on the seventh level of Hell, where they are turned into stunted trees that produce poison in the place of fruit. One of these monstrosities tells the poet what has happened to him and what will occur on Judgment Day:²⁰

When the fierce spirit separates amiss

From out the body whence itself has torn,

Minos consigns it to the seventh abyss. . .

We shall go seek our bodies like the rest,

But with them never to be re-arrayed

For ‘tis not just to have what we divest.

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¹⁸. The comparison is somewhat weird, since the two men were not only very different people but played rather different roles in public affairs.
¹⁹. Plutarch, supra note [ ], at 1072.
²⁰. Dante Alighieri, The Divine Comedy (Melville Anderson, trans.) 52 (1944) (Canto XIII, ll. 94-108)
Here we shall drag them, and the forest glade
Shall see our bodies hanging dismally,
Each on the thorn tree of its injured shade.

The person who has suffered this fate is Pier delle Vigne, advisor to Frederick II, the Holy Roman Emperor, who incited Frederick’s ire by allegedly conspiring with his arch-enemy, Pope Innocent IV. At the time he committed the suicide for which Dante, and his society, were so ready to condemn him to eternal perdition, Frederick had cast delle Vigne into a dungeon and put out his eyes.\textsuperscript{21}

Six centuries after Dante, Emile Durkheim described the distribution and frequency of suicide and attempted to discern its cause, in a book that remains one of the classics of sociology.\textsuperscript{22} After discussing the “extra-social factors” that cause suicide, such as psychopathology and heredity, he proceeds to consider social causes, distinguishing among egoistic, altruistic and anomic suicide. Summarizing the effect of these social causes, he states: \textsuperscript{23}

Individual peculiarities could not explain the social suicide-rate; for the latter varies in considerable proportions, whereas the different combinations of circumstances which constitute the immediate antecedents of individual cases of suicide retain approximately the same relative frequency. They are therefore not the determining causes of the act which they precede.\ldots

Wholly different are the results we obtained when we forgot the individual and sought the causes of the suicidal aptitude of each society in the nature of the societies themselves. The relations of suicide to certain states of social environment are as direct and constant as its relations to facts of a biological and physical character were seen to be uncertain and ambiguous. Here at last we are face to face with real laws, allowing us to attempt a methodological classification of types of suicide.

\textbf{A. The Classical Morality of Honor}

What is behind the dramatic changes in Western attitudes toward suicide that these three quotations typify? Not surprisingly, the answer is that the changes reflect more general transformations in the moral systems that prevailed in the different eras from which the quotations are drawn. The first quote comes from what may be called, for convenience, the classical or Greco-Roman era. This is, in fact, a

\textsuperscript{21} Dante Alighieri, The Divine Comedy 80 n.3 (Carlyle-Wicksteed trans.) (New York: Modern Library, 1932)
\textsuperscript{22} Emile Durkheim, Suicide: A Study in Sociology (John Spaulding & George Simpson, trans.) (1952). See also Emile Durkheim, The Division of Labor in Society 191-93 (W.D. Halls, trans.) (1984). For an analysis of Durkheim’s work on suicide, see Steven Lukes, Emile Durkheim: His Life and Works 191-225 (1973);
\textsuperscript{23} Id. at 260, 262.
long and complex period, as long as or longer than the medieval, renaissance, reformation, enlightenment and modern periods which followed, and itself displays great variations of moral attitudes. But one major aspect of Greco-Roman morality that persists over time is the morality of honor. While virtue is a more general theme that incorporates the rather vague concept of honor, honor lies at the center of the virtues that classical society identified. It appears to be the dominant morality of the Homeric era, and plays a significant, if not exclusive role, in the more sophisticated moral thinking of the succeeding eras.

According to this moral system, one's position in society is determined by one's status, and status, even if originally conferred by birth, is maintained by preservation of one's honor. Because of its link to status, honor was intrinsically hierarchical; one gained honor by showing respect and loyalty to powerful superiors, such as the king, and also by being generous and protective towards one's inferiors, and particularly one's dependents. At the same time, honor was an essentially individualized possession. It involved one's personal reputation, one's position in the eyes of others. This reputation was based on courage, fortitude and dignity; it could be damaged by another's disrespect, and restored only by canceling that disrespect by some socially-acknowledged means, such as punishing its author. As William Miller observes: “To simplify greatly, honor is that disposition which makes one act to shame others who have shamed oneself, to humiliate others who have humiliated oneself.” Ultimately, honor was simply the purpose of life. In honor-based societies, as M. I. Finley notes, “[e]very value, every judgment, every

24. Periodization is often controversial. The period from the Middle Ages to contemporary times is about 1000 years, but the period from the formation of the Greek city states to the fall of Rome was about 1300 years. Since what used to be called the Dark Ages is now called the Early Middle Ages, that 500 years might be added to the post-classical era, but one can also date the classical era back 500 years to Mycenaean times, when Greek mythology took form, and there is also an argument for attaching part of the Dark or Early Middle Ages to the classical era as well.


27. William Miller, Bloodtaking and Peacemaking 26-41 (1990)


29. Miller, Humiliation, supra note [ ], at 84.
action, all skills and talents have the function of either defining honor or realizing it.”

The relationship between honor and death was well established: honor was more important. Finley goes on to say: “The Homeric heroes loved life fiercely, as they did and felt everything with passion, and no less martyr-like characters could be imagined; but even life must surrender to honor. . . [A]t the call of honor they obeyed the code of the hero without flinching and without complaining.” This relationship applied not only to death in battle, but also to suicide. Perhaps the most famous suicide in Greek mythology is Ajax, who succumbs to an uncontrollable rage when Agamemnon awards Achilles’ armor to Odysseus – this being a direct insult to his honor—and resolves to murder the entire Hellenic army while they sleep. Athena saves the Hellenes by turning Ajax insane, so that he slaughters their cattle and sheep instead. When he comes to his senses, he realizes that his madness has resulted in a greater loss of honor, and falls upon his sword. In Sophocles’ play, Menelaus refuses to give Ajax a proper burial, but the reason is that he tried to murder the Hellenes, not because he committed suicide.

This approach to suicide persisted throughout the classical period. Plutarch, who was essentially a Platonist, clearly regarded suicide as a virtue when its purpose was to preserve a person’s honor. To flee from death by being carried around by one’s servants was undignified and dishonorable; to welcome death by taking poison, to take refuge “at a mightier alter,” was an act of admirable courage. The Stoics, Plutarch’s contemporaries, continue this theme, although modifying it into the more refined or sophisticated notion of dignity, and are even more explicit in their support for suicide. According to Marcus Aurelius, if one cannot maintain virtues such as rationality and equanimity, “depart at once from life, not in passion, but with simplicity and freedom and modesty, after doing this one laudable thing at least in thy life, to have gone out of it thus.” At other points, his Stoicism leads him to an almost casual approach to suicide. “But it is not worth while to live, if [right actions] cannot be done. — Take thy departure then from life contentedly, just as he dies who is

30. Finley, supra note [ ], at 121
31. Id.
32. 2 Robert Graves, The Greek Myths 321-25 (1960). The event is not in the Iliad, since it occurs after the death of Achilles.
33. Sophocles, Ajax, in Electra and Other Plays 17, 54 (E.F. Watling, trans.) (1953). Through the efforts of Teucer, his half-brother, and of Odysseus, Ajax receives a proper burial.
in full activity, and well pleased too with the things which are obstacles.” 35 Epictetus, perhaps the leading Stoic thinker of the era, 36 has a more religious orientation that begins to pull away from older notions of honor and to confront transcendental issues in a manner that resembles Judeo-Christian writings, but he is just as supportive of suicide as Marcus. He is reported by his student as having said: “remember that the door is open. Do not be a greater coward than the children, but do as they do. Children, when things do not please them, say ‘I will not play any more’; so, when things seem to you to reach that point, just say ‘I will not play any more’, and so depart, instead of staying to make moan.” 37

This is not to suggest that the ancient world uniformly favored suicide. A recurrent counter-theme is that suicide is a dereliction of duty, that by depriving the state of one of its members, it represents a wrong against the community. It would appear to be on this ground that suicide was illegal in the Roman Empire, since the penalty imposed was the forfeiture of the suicide’s property to the state. 38 Both Plato and Aristotle condemn suicide, but Aristotle’s condemnation is tepid and Plato’s circumscribed. Aristotle states: “he who through anger voluntarily stabs himself does this contrary to the right rule of life, and this the law does not allow; therefore he is acting unjustly. But towards whom? Surely towards the state, not towards himself.” 39 This passage, from the Ethics, sounds more like an explanation of an odd law than an ethical condemnation. Plato does condemn suicide, but recognizes exceptions for a person acting under state command, suffering from an “excruciating and unavoidable misfortune,” or falling into “some irremediable disgrace that he cannot live with,” and reserves his condemnation for someone who “imposes this unjust judgment on himself in a spirit of slothful and abject cowardice.” 40 Despite the disapproving tone, the exceptions Plato recognizes are so broad that they amount to a virtual endorsement of the practice, while his condemnation is so qualified that it is almost a

35. Id. at 550 (VIII.47).
37. Arrian, Discourses of Epictetus (P.E. Matheson, trans.), in Oates, supra note [ ], at 223, 266 Epictetus did not write anything himself; Arrian’s Discourses are assumed to record his teachings accurately; if not, then they record the thoughts of Arrian.
39. Aristotle, supra note [ ], at 386 (1138a)
40. Plato, Laws (Trevor Sanders, trans.), in Cooper, supra note [ ] at 1314.(873c-d). In excusing suicide under state command, Plato is certainly thinking of Socrates, see Plato, Crito (G.M.A. Grube, trans.), in id. at 37. The penalties Plato would impose on suicides all relate to the mode of their burial.
nullity—after all, almost any action taken “in a spirit of slothful and abject cowardice” would merit moral condemnation.

B. The Christian Morality of Higher Purposes

Christianity replaced the morality of honor with what can be called a moral of higher purposes. Rather than defining morality in terms of personal attributes and comportment, Christian transcendentalism saw morality as both a path to salvation and an indication that one was going to be saved. This morality involved a rejection of the material world, as Max Weber noted in his path-breaking study, *The Sociology of Religion.*[^41] The world, from the perspective of such world-rejection religions:

> is full of temptations, not only because it is the site of sensual pleasures which are ethically irrational and completely diverting from things divine, but even more because it fosters in the religiously average person complacent self-sufficiency and self-righteousness in the fulfillment of common obligations, at the expense of a uniquely necessary concentration on active achievements leading to salvation.  

[^42]

But the morality that formed an integral part of the Christian religion possessed a positive as well as a negative dimension. It not only counseled an ascetic rejection of worldly pleasures, but also an affirmative ethos that human action should be directed toward higher purposes. These purposes were both individual and collective; individually, each person should direct his or her actions to achieving or accepting personal salvation[^43] while collectively, people should create a social and political environment that facilitated such individual action.[^44] Both the source and content of the actions that

[^41]: Max Weber, *Economy and Society*, vol. 1, at 541-76 (Guenther Roth & Claus Wittich eds.) (1978)

[^42]: Id. at 742.


would produce this desirable effect was a matter of considerable controversy. During the Middle Ages, theologians debated whether reason was a sufficient source by itself, or faith a sufficient source, and whether the required actions consisted of actions that produced results, actions based on good intentions, or a combination of the two.\textsuperscript{45} Reformation thinkers did not resolve these controversies but did succeed in adding others. They challenged the Catholic view that one could look to Scripture, the Church Fathers, and the scholastic tradition for the answer to such questions, and claimed that Scripture alone was the authority. They argued that human beings are saved by faith alone, and not by good works, however well-intentioned, but then revived good works as an emblem of true faith.\textsuperscript{46} One constant throughout all these controversies, however, is that human action must obey the commands of God, and be directed toward the individual’s salvation.

The transition from the Greco-Roman morality of honor to the Christian morality of higher purposes was far from unidirectional or well-defined. With the exception of a small and increasingly unimportant number of Jewish converts, Christianity rested on Greco-Roman social foundations. The pre-existing morality of this society, like its pagan religion, survived well into the Christian era, delaying and diluting the impact of the new religion.\textsuperscript{47} Moreover, shortly after Christianity’s triumph, the Empire was invaded by barbarian tribes and the process of converting a pagan population to the Christian religion and its attendant morality had to begin anew. The social and economic conditions that resulted from these catastrophic invasions more closely resembled the Greek Dark Ages, when the Greco-Roman morality of honor first took shape, then those of the commercial, urban

\begin{itemize}
\item \textsuperscript{45} Ockham, supra note [Philosophical Writings], at 109-25, 160-63; John Duns Scotus, Philosophical Writings 133-62 (Allan Wolter, trans., 1962). See John Haldane, Medieval and Renaissance Ethics, in Singer, supra note [ ], at 133; David Luscombe, Medieval Thought 52-56 (1997).
\item \textsuperscript{46} Martin Luther, Bondage of the Will (J.I. Packer, trans.) (1957). See Heiko Oberman, Luther: Man Between God and the Devil (1989); Bernard Reardon, Religious Thought in the Reformation (New York: 2\textsuperscript{nd} ed. 1995); W.P. Stephens, Zwingli: An Introduction to His Thought (1992); Francois Wendel, Calvin: Origins and Development of His Religious Thought (1987).
\item Biblical sources for basing salvation on works are Matthew 25:34-40; Mark 10:21; Luke 16:19-31. See also James 2:14-26. According to St. James, “What doth it profit, my brethren, though a man say he hath faith, and have not works? can faith save him? . . . But wilt thou know, O vain man, that faith without works is dead?” Id. 14-20. Biblical sources for basing salvation on faith alone come primarily from St. Paul. See Romans 1:17-18; Colossians 1:4-24. In the cited passage from Romans, St. Paul says: “for it is the power of God unto salvation to every one that believeth; to the Jew first, and also to the Greek. For therein is righteousness revealed from faith to faith: as it is written, The just shall live by faith.”
\item \textsuperscript{47} See Robin Lane Fox, Pagans and Christians (1986)
\end{itemize}
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and sophisticated later Empire. In these circumstances, a morality of honor once again arose under the name of chivalry.\(^{48}\) It was only in the High Middle Ages, as Europe was re-Christianized through the Gregorian reforms, the monastic movements, the Peace of God movement and the crusades,\(^{49}\) that the morality of higher purposes was securely and exclusively established.

This morality of higher purposes generated a complicated set of attitudes toward death. The early Christian Church did not take a definitive position on suicide,\(^{50}\) and there is no explicit prohibition of suicide in the Jewish or Christian Bible.\(^{51}\) But the martyrdoms that were so central to its self-conception were often close to voluntary self-destruction. The policy of the Roman government was not only to tolerate, but to actually encourage all religions, and demanded only that the Empire’s inhabitants include sacrifices to the imperial cult among their rituals. Persecutions against Christians were based on their refusal to conduct these sacrifices,\(^{52}\) but most Roman officials had little taste for such an enterprise, and begged the Christians to relent. Just a pinch of incense, they would urge their Christian captives, just a simple little oath.\(^{53}\) Many early Christians adamantly refused, demanding to be martyred with quasi-suicidal insistence.

Robin Lane Fox quotes the Coptic account of Colluthus’s trial in early fourth century Egypt, as follows:

“Don’t you see the beauty of this pleasant weather?” asked his hopeful judge. “No pleasure will come your way if you kill yourself. But listen to me and you will be saved.”

\(^{48}\) See Georges Duby, The Chivalrous Society (1980); Maurice Keen, Chivalry (1984)


\(^{50}\) Crone, supra note [ ], at 17.

\(^{51}\) There are a number of Biblical stories in which a person commits suicide, asks to die, or takes action leading directly to death. Some of these persons are portrayed as good e.g. Samson, Judges 16:29-30; Saul, 1 Samuel 31:4-6, while other are portrayed as evil, e.g. Ahab, 2 Samuel 17:1-29 and, of course, Judas, Matthew 27:5. No explicit statement about suicide itself is provided. St. Augustine based his condemnation of suicide on the commandment that “Thou shalt not kill,” Exodus 20:13, see Augustine of Hippo, Concerning the City of God Against the Pagans (Henry Batterson, trans.) (London, Penguin, 2003) (I.15), and many Christians quote 1 Corinthians 3:17, where St. Paul writes: “If any man defile the temple of God, him shall God destroy; for the temple of God is holy, which temple you are.” These passages can only be applied to suicide by creative interpretation, however. This itself casts doubt on the conclusion that suicide is prohibited, since neither the Old nor the New Testaments has much difficulty being explicit about prohibitions when it wants to be.

\(^{52}\) The Jews, who of course refused as well, were granted an exemption out of respect for the age and intensity of their religious beliefs.

\(^{53}\) See Fox, supra note [ ], at 421
“The death which is coming to me,” Colluthus was said to have answered, “is more pleasant than the life which you would give . . .” 54

Eusebius, although he speaks of the “appalling cruelty” of Roman persecution, 55 provides similar accounts. “The proconsul tried to dissuade [the Christian], stressing his youth and begging him as one still in the very prime of life to spare himself; but without a moment’s hesitation he drew the savage beast towards him, wellnigh forcing and goading it on, the more quickly to escape from their wicked, lawless, life.” 56

The appeal of martyrdom, of course, was that it was said to absolve all sins and provide immediate entry to Heaven, where the martyr’s rewards were a hundred times greater than those of an ordinary Christian. 57 This created the pragmatic danger of mass suicides for Christianity. The reversal of Greco-Roman attitudes on this subject can thus be seen as the necessary consequence of a religion that portrayed the after-life as a glorious reward, rather than a dreary shadow world. But a deeper, more phenomenological explanation lies in the underlying shift in moral attitudes that accompanied the Christianization of the Roman Empire. Because its dominant morality was that human action must serve higher purposes, suicide was rejected as the selfish act of a “fierce spirit,” one that did not serve the purposes that God prescribed for human beings. Translating the Greco-Roman notion that suicide was a wrong against the community into transcendental terms, St. Augustine, perhaps the most dominant figure in the early Church, argued, people had a moral obligation to remain alive and endure whatever miseries confronted them. 58 The closely-related act of welcomed martyrdom was distinguished because it was seen as serving divine purposes.

By the High Middle Ages, when Christianity had been fully reasserted, the aversion to suicide became intense. Dante’s enthusiasm for inflicting eternal punishment on a man who had so little reason to live is characteristic of the era. When Joan of Arc, imprisoned in the tower of Beaurevoir by John of Luxembourg, learned that she was about to be sold to the English, she leapt from the tower in an attempt to escape. She was knocked unconscious by

54. Id. (ellipsis in original).
55. Eusebius, History of the Church 125 (G.A. Williamson, trans.) (1965) (Bk. 3, § 17)
56. Id. at 169 (Bk. 4, § 14). This is not to suggest that all Roman persecutions were mild. The Romans specialized in cruelty, and Eusebius reports the incineration of an entire Christian town by Roman legionaries, id. at 341 (Bk. 8 § 11). The point is that many martyrs were subject only to the mildest demands, and embraced death in a manner that was close to suicide.
57. Fox, supra note [], at 419; see generally id. at 419-92.
58. Augustine of Hippo, supra note [ ] (I.23)
her fall, and thus recaptured, but suffered no other damage, and was fully recovered in short order. At her trial, much was made of the fact that jumping from the tower—the distance to the ground was about forty feet—was a suicide attempt, and thus a punishable sin.\footnote{Marina Warner, Joan of Arc: The Image of Female Heroism 112-14 (1981)} The fact that she was facing almost certain execution, and that she had actually survived the jump without serious injury of any kind, was apparently not sufficient to refute the possibility that she may have intended this horrendous sin.\footnote{Of course, the English were not conducting a fair trial, but looking for reasons to execute her. Thus, they simultaneously charged that if she had not intended to kill herself, she must have jumped because her voices told her she could fly, which was clearly the work of the devil. Id at 114. Still, they were in a highly-charged political situation, and had to devise plausible-sounding charges.}

\textbf{C. The Modern Morality of Self-Fulfillment}

The late eighteenth or early nineteenth century saw still another transformation of Europe’s moral system, as result of the momentous changes resulting from the industrial revolution, the advent of the administrative state and the development of systematic natural and social. What emerged, although it was neither fully formed nor fully recognized for another century, can be described as a morality of self-fulfillment.\footnote{The following description also appears in Edward Rubin, Sex, Politics and Morality, 47 Wm. & Mary L. Rev. 1 (2005).} Its central idea is modern individualism: that each person should be able to lead a life that makes use of that person’s distinctive abilities and satisfies his or her particular aspirations and desires.\footnote{See Hannah Arendt, Between Past and Future17-40 (1954); Durkheim, supra note [Division of Labor]; Jurgen Habermas, The Theory of Communicative Action: Vol 1: Reason and the Rationalization of Society (Thomas McCarthy trans., 1984); Niklas Luhmann, The Differentiation of Society (1982); J.B. Schneewind, The Invention of Autonomy: A History of Modern Moral Philosophy (1998); Max Weber, The Protestant Ethic and the Spirit of Capitalism (Talcott Parsons, trans., 1958).} In other words, human action should not be directed toward a uniform ethos of achieving and honor, nor toward higher purposes prescribed by a transcendental religion, but toward self-defined goals that will provide the most subjectively satisfying life.\footnote{Gewirth distinguishes between these two modes of self-fulfillment, identifying them as aspiration-fulfillment and capacity-fulfillment. Alan Gewirth, Self Fulfillment 13-18 (1998). While these two notions are theoretically distinguishable, as Gewirth suggests, they are connected both psychologically and sociologically in the modern world. Psychologically, people’s capacities tend to determine their aspirations, both because the modern world’s social mobility encourages talented people to aim high, and because its competitiveness and relative lack of entrenched privilege cautions less talented people to be realistic. Sociologically, the modern world allows for a wide range of roles, ideologies and life experiences, allowing individuals to}
The intellectual origins and ramifications of this moral system are too complex to trace in this discussion, but one obvious and essential component is the shift from a religious to a psychological concept of human well-being, and of human meaning in general. While this is part of the general secularization of Western civilization that has been occurring since the Renaissance, the shift toward psychology represents a distinctive theme in modern society. Its greatest proponent, of course, was Freud, who redefined subjective discomfort with sexuality from a salutary transcendental warning to a dysfunctional mental affliction. 64 The response that follows from this redefinition is therapy, not prayer, that is, an effort to eliminate the sense of discomfort, rather than to suppress the underlying desire. 65 This equation of ontological well-being with somatic well-being—the term mental health being indicative and distinctly modern—reflects an ethos which excludes higher purposes, and defines human goals in particularistic terms.

From the perspective of the pre-existing morality of higher purposes, self-fulfillment may not seem like a morality at all, but rather like the absence of morality. In fact, like the Greco-Roman morality of honor or the Christian morality of higher purposes, it provides comprehensive criteria for people’s relationship to each other, as well as their understanding of themselves. It generates the political principle that each person should be allowed as much freedom of action as he or she can exercise without impinging on the efforts of others to achieve self-fulfillment. But it also extends to more personal principles that we place beyond the reach of politics, such as an obligation to provide others with assistance in their efforts to fulfill themselves. Conversely, the criteria lead to moral proscriptions on conduct that would interfere with such efforts in the name of higher purposes or some other principle that is external to the individual.

Just as Greco-Roman morality subordinated life to its master value of honor, and Christian morality subordinated it to the service of higher purposes, modern morality subordinates life to self-fulfillment.

64. On Freud generally, see Peter Gay, Freud: A Life for Our Time (1998)
For the most part, this means that life is to be preserved at nearly all costs; in order for individuals to fulfill themselves, it is generally necessary for them to be alive. Modern morality is thus more solicitous of life than either of its predecessors. It views the sacrifice of life for honor as childish, as wasteful pride, and perhaps—since it is the first moral system to affirmatively assert the equality of men and women—as testosterone-driven male display behavior. It views martyrdom as a fetishistic and unnecessary response to duress. What is important is to lead a life that is fulfilling in its entirety, which meets the individual’s goals, aspirations and desires. And if the insult to one’s honor, or compelled violation of one’s religion is so disturbing that impedes one’s ability to lead a fulfilling life, one should go into therapy to rid oneself of this obsession.

According to the morality of self-fulfillment, suicide is an appropriate, though not obligatory, response when there is no further possibility of living a fulfilling life. This is always a subjective judgment by the individual. In some cases, the circumstances that produce this situation are observable by another person, as when the individual is suffering from a painful and soon-to-be-fatal disease. In other cases, these circumstances may be apparent only to the individual, like Edward Arlington Robinson’s Richard Cory, who was obviously in despair despite his worldly successes. Those who are devoted to the individual may feel profound sorrow at this suicide, but

66. Consider the most famous incident of death for honor in American history—the duel between Alexander Hamilton and Raymond Burr. Its late date—dueling had been illegal in virtually all Western countries for hundreds of years—betrays it as an atavism, a holdover from a prior era that had survived among a narrow social class. The dispute centered on the single word “despicable” that Hamilton was reported in a newspaper to have applied to Burr’s behavior. Burr demanded that Hamilton retract the word, which he had probably never used in the first place, but Hamilton refused out of a sense of wounded honor, and goaded Burr into challenging him. Having done so, he decided to throw away his first shot, and recorded his intention, as further proof of his honor. At the time Burr, whom Hamilton knew to be an expert marksman, gunned him down, Hamilton was the primarily source of support for his sickly wife and six children — there would have been seven, except his eldest son had been killed in exactly the same manner one year before. See Ron Chernow, Alexander Hamilton 680-709 (2004)

67. And he was rich—yes, richer than a king —
And admirably schooled in every grace:
In fine, we thought that he was everything
To make us wish that we were in his place.
So on we worked, and waited for the light
And went without the meat, and cursed the bread
And Richard Cory, one calm summer night,
Went home and put a bullet through his head
Edward Arlington Robinson, Collected Poems 82 (1929)
the suicide itself is not a matter for moral condemnation. Of course, it may be condemned on the grounds that others were dependent on the individual for their own self-fulfillment, but this is a condemnation of irresponsible action, not of suicide per se.

The quoted passage from Durkheim reflects the way suicide is viewed in the new morality of self-fulfillment as clearly as the passage from Plutarch reflects the morality of honor, or the passage from Dante reflects the morality of higher purposes. Of course, Durkheim’s discussion is sociological, not moralistic, but that is precisely the point. According to the morality of self-fulfillment, dysfunctional human behavior does not result from a lack of virtue or belief, but from the operation of large-scale social forces. Part of the complex of cultural phenomena that both generate and are generated by the morality of self-fulfillment is the development of social science, and the general attitude toward social and individual behavior that this development implies. Because individual behavior is seen as the result of social forces, the modern response to it is not one of general approval or condemnation. Rather, we try to intervene at the individual level to help people deal with these forces in terms of their own values, and their own aspirations for themselves. We try to intervene at the social level to ameliorate the negative impact of these forces on individuals. Durkheim, reflecting modern attitudes, ascribes suicide to sociological forces, not to a moral failing of the individual; the modern response to this way of understanding suicide is therapy for the individual and social welfare programs for society at large.

II. SUICIDE AND LAW

A. The Establishment Clause

Lurking behind the dispute about assisted suicide is a clash of conflicting moralities regarding suicide itself. Behind this, in turn, lies a more general conflict regarding different conceptions of morality in general. There have been various efforts to explain this readily apparent division in American society. George Lakoff attributes it differing approaches to child rearing superimposed on to a universally accepted analogy between society and the family. Political
conservatives, he argues, favor Strict Father morality, which emphasizes individual responsibility and parental punishment in a threatening world that is in danger of becoming worse. In contrast, liberals favor Nurturant Parent morality, which emphasizes emotional support and education in a complex world that has the potential of becoming better. James Hunter sees the conflict as emerging from schisms in Protestantism, Catholicism and Judaism between progressive and traditionalist interpretations. During the twentieth century, he argues, previous divisions among different religious denominations were replaced with a cross-cutting distinction between what he describes as “orthodox” and “progressivist” morality that disagree about the meaning of American history and the sources of moral authority.

These theories are illuminating, but, for immediate purposes, neither Lakoff nor Hunter addresses the issue of assisted suicide, nor is it clear how their frameworks would explain our current attitudes. More generally, Lakoff’s approach is non-historical and Hunter’s treats contemporary events as the whole of history. What has been suggested above is an historical account that links attitudes toward suicide with major trends in the moral thinking of Western society over the course of its entire development. The point is not simply to advance a more venerable argument, but to suggest that basic moral attitudes must be viewed in an extensive historical perspective, that they must be placed in the context of the cultural experience which generates them. This is not only because such attitudes develop over long periods of time, and are linked with other long-developing belief systems, but also because it is difficult to understand their distinctive features without the comparison afforded by extended historical analysis.

With respect to the present debate, the morality of honor is largely defunct in the Western world, despite occasional reverberations. Our current cultural experience involves the transition from the Christian morality of higher purposes to the modern morality of self-fulfillment. This transition is gradual, having been in process for at least two centuries, but it is far from gentle. In fact, it is confusing, because we are moving from an established ethos to an emerging one, it is painful, because the displacement of something as basic as morality inevitably engenders a severe sense of loss, and it is culturally vertiginous, because the criteria by which we decide whether social change is good or bad are the very thing that is undergoing transformation.

71. James Hunter, Culture Wars: The Struggle to Define America (1991)
The emergence of the new morality of self-fulfillment can be seen in the abolition of criminal laws against suicide and attempted suicide in every state,\textsuperscript{72} as well as in Oregon’s Death With Dignity Act\textsuperscript{73} The resistance to this new morality, and the desire to cling to its declining predecessor, can be seen in continued opposition to assisted suicide, the controversy over the Terri Schiavo case, and, of course, the Ashcroft Directive. It is hardly a surprise that the Ashcroft Directive was produced by a Republican administration, since the Republican Party draws much of its support from rural, conventional, and religious people who are generally committed to the older morality of higher purposes, as opposed to the Democratic Party, which is heavily supported by urban, change-oriented and secular people who tend to favor the morality of self-fulfillment.

All of this is a purely descriptive account, with no effort to pass normative judgments. Such judgments would be difficult to formulate, of course, because they require a choice among the competing moralities, or the introduction of some different morality that would possess even less traction to modern Americans than either of the two conflicting ones. But law, and particularly constitutional law, provides a basis by which judgments can be advanced. The U.S. Constitution ensrones a set of normative choices within our legal system, and these norms can be applied to resolve moral controversies, at least when state action is involved.

In the case of suicide, or assisted suicide, the relevant provision of the Constitution is the Establishment Clause. The meaning of the Establishment Clause, like that of so many of the Constitution’s important provisions, is highly controversial, and subject to a number of competing approaches. These can be described, moving from most to least restrictive on governmental action, as strict separation, neutrality and accommodation.\textsuperscript{74} Strict separation is the principle expressed by \textit{Everson v. Board of Education},\textsuperscript{75} the Supreme Court’s first decision that applied the Establishment Clause to the states. It sees the first amendment as having erected a “high and impregnable” wall between church and state\textsuperscript{76} and as creating an essentially

\textsuperscript{73} Or. Rev. Stat. § 127.805--.885 (2005).
\textsuperscript{74} See Erwin Chemerinsky, Constitutional Law: Principles and Policies 977-84 (1997). John Witte suggests that recent cases display several additional principles, which he describes as endorsement, coercion and equal treatment. John Witte, Religion and the American Constitutional Experiment 149-84 (2000).
\textsuperscript{75} 330 U.S. 1 (1947).
\textsuperscript{76} Id. at 18. For other decisions expressing this separationist view, see \textit{Walz v. Tax Commissioner}, 397 U.S. 664 (1970) (upholding state tax exemptions for religious organizations);
secular government. Its stringency has led to its decline in recent years and to its displacement by the principle of neutrality. Neutrality forbids government from favoring one religion over another, but is distinguishable from separationism, at least in theory, because it also forbids the government from favoring secularism over religion. It is often operationalized through the Lemon test, which provides that a statute is constitutional only if it has a secular purpose, neither advances nor inhibits religion as its primary effect, and does not foster excessive government entanglement with religion. The Lemon test is far from unambiguous, and has been severely attacked by some members of the Court, but it has never been overruled, and probably remains the leading interpretation of the Establishment Clause.

The third principle is frequently described as accommodation and reflects the Court’s more sympathetic treatment of religion in recent years. This approach allows government to acknowledge the

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77. See Abington School District v. Schempp, 374 U.S. 203, 313 (Stewart, J., dissenting); Alan Schwarz, No Imposition of Religion: The Establishment Clause Value, 77 Yale L.J. 692 (1968). But see John Jeffries and James Ryan, A Political History of the Establishment Clause, 100 Mich. L. Rev. 279 (2001) (concept of separation was strongly motivated by anti-Catholicism, and did not extend to religious activities regarded as acceptable to Protestants, such as reading the Bible in school).


religious character of the American people, and only invalidates laws that coerce religious activity. It has been advanced in several spirited dissents 85 and by the plurality opinion in Mitchell v. Helms, 86 but it does not seem to have supplanted the neutrality test, and has been extensively criticized by commentators. 87 Some of the recent cases that were decided under the neutrality principle, however, have a distinctly accommodationist flavor, 88 and the appointment of Chief Justice Roberts and Associate Justice Alito may well bring this rationale in greater favor.

In the midst of this doctrinal farrago, 89 it is important to keep the central and agreed upon purpose of the Establishment Clause in mind. After Luther initiated the Reformation, 90 Europe was convulsed by two centuries of almost continuous and often devastating religious war. 91 By the eighteenth century, thoughtful people had begun to recognize that such conflict was inevitable as long as governments attempted to impose one religion on confessionally diverse

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86. 530 U.S. 793 (2000)


89. Daniel Farber, in the final chapter of his book discussing the doctrinal complexities of the first amendment states: "From a lawyer's point of view, the Establishment Clause is the most frustrating part of First Amendment Law. The cases are an impossible tangle of divergent doctrines and seemingly conflicting results." Daniel Farber, The First Amendment 263 (1998).
90. See Roland Bainton, Here I Stand: A Life of Martin Luther 79 (1950); Franz Lau & Ernst Bitzer, A History of the Reformation in Germany to 1555, at 17 (Brian Hardy, trans.) (1969); John Todd, Luther: A Life 102-04 (1982)
populations. 92 This insight became a constitutive tenet of the intellectual movement known as the Enlightenment. 93 The framers of the U.S. Constitution were the heirs of the Enlightenment, at the very least, and were often identified, both by themselves and by contemporary Europeans, as full-fledged members. 94 In creating a new political regime, they seized the opportunity, denied to their tradition-bound European mentors, of separating religion from government, and establishing a secular state.

Of course, their conception could not be fully realized; no matter how clearly stated a distinction is in theory, it will become tangled and complex in practice. But the underlying principle can serve as an interpretive guide, however obscured it may become in the dense thicket of relationships between a highly regulatory regime and its diverse inhabitants. Whatever the rule should be regarding subtle issues such as the release of children from public school to attend religious institutions, the use of public facilities by groups that include those with varying levels of religious affiliation, or the public support of secular eleemosynary activities by religious organizations, it seems clear that the state should not compel people to follow the dictates of any given religion or impose burdens on them for failing to do so. It was state action of this sort that led to the religious wars in Europe, and that continues to be a source of incalculable misery in the modern world. It was precisely the horror of such wars that the Framers were trying to avoid.

Thus, the Establishment Clause is properly read as containing a principle that disfavors religiously motivated action against individuals that is coercive or burdensome. This principle does not appear explicitly in any of the current tests for Establishment Clause violations, and may seem, at the outset, more applicable to the Free Exercise Clause. The reason is that it resolves relatively few Establishment Clause cases. It may be a violation of the Establishment Clause to display a cross or a nativity scene on public property, 95 but the display is entirely non-coercive. Similarly, financial support for religious schools may violate the Establishment

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92. For two classic seventeenth-century statements of this theme, see Jean Bodin, Colloquium of the Seven About Secrets of the Sublime (Marion Kuntz, trans.) (1975); John Locke, A Letter Concerning Toleration, 2nd ed. (William Popple, trans.) (1955).
94. Gay, supra note [ ], at 555-68.
Clause, but even a diversion of state funds for improper purposes is not really much on an intrusion on one's life.

Coercion is a central principle in Free Exercise cases, however, and when applied to the Establishment Clause as well produces a unified framework of analysis that links these two obviously related provisions. The Free Exercise Clause prohibits government coercion against minority religions, that is, it prohibits the government from forbidding the religious practices of small groups within society. The Establishment Clause prohibits government coercion in favor of majority religions, that is, it prohibits the government from compelling the religious practices of the dominant group within society. While coercion and burden may not be a useful principle for most Establishment Clause cases, it does appear to be an underlying consideration that, if present, should add to the stringency with which existing tests are applied. Thus, when truly coercive governmental action is involved, the wall of separation should be higher, neutrality more complete, and accommodation less extensive. In terms of the Lemon test for the neutrality principle, coercive or burdensome action would mean that courts should demand a particularly strong showing that the state action in question does not advance religion, and that it possesses a clear and convincing secular purpose.

B. Establishment and Suicide

When the Establishment Clause, as just interpreted, is combined with the cultural history of suicide presented in the foregoing section, it becomes apparent that laws prohibiting suicide are unconstitutional. Such laws are motivated by religious considerations; they represent a choice of the morality of higher purposes over the modern morality of self-fulfillment. This morality is specifically Christian; in fact, it is a rather particular, historically-grounded interpretation of Christianity since, as stated above, the prohibition against suicide does not even appear in the Jewish or

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97. See, e.g., Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (striking down city ordinances that prohibited the ritual sacrifice of animals within the city limits because these ordinances were obviously designed to forbid one of the practices of Santeria). In Braunfeld v. Brown, 366 U.S. 599 (1961), the Warren Court rejected a Free Exercise claim brought by orthodox Jews against Pennsylvania's Sunday closing law on the ground that the law may have disadvantaged Jews, but it was not coercive.

98. See, e.g., Abington School District v. Schempp 374 U.S. 203 (striking down the practice of reading Biblical verses in public school classes or over the school intercom at the start of the day
According to this Christian morality, attempted or successful suicide is a great wrong; it should be punished, both to express society’s disapproval and to deter others from taking the same action. According to the modern morality of self-fulfillment, however, suicide is an unfortunate event that should be prevented by therapy, if possible, but accepted by society as a valid personal decision. To choose between the two, and more specifically to use the coercive force of society in an effort to forbid one morality in favor of another, is a basic violation of the Establishment Clause.

Prohibitions on suicide are not only religiously motivated action, but they are coercive action. They punish individuals for doing something that the individual chooses to do. Thus, according to the principles stated above, such prohibitions should be regarded with a high degree of scrutiny. To begin with, the wall of separation should be at its most adamantine when coercive action is involved, and a religiously motivated prohibition against suicide clearly seems to breach that wall. In terms of the neutrality requirement, and specifically the *Lemon* test for that neutrality, the prohibition against suicide can be readily regarded as advancing religion, and cannot be sustained on the basis of any secular justification. The reason why the prohibition advances religion has been discussed above. With respect to the question of secular justification, it is difficult to articulate any general, non-religious argument against suicide. While it would of course be better if no one were so ill, or so despairing that they wanted to kill themselves, all modern people, even those who want to kill themselves, would presumably agree with that. But what is the rationale for forcing people to live when they genuinely want to end their lives?

As for accommodation, religions that consider suicide as wrongful can be accommodated by state action that falls far short of punishing divergent points of view. Thus, the state may fund suicide prevention services for adults, provide counseling to this effect in public schools, ban instrumentalities that encourage suicide, such as firearms, and prohibit drugs that pose even minor risks of inducing.

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99. See note [ ] supra.

100. Stephen Carter and Cass Sunstein both argue that the courts should not interject themselves into this highly controverted issue, but rather allow the democratic debate to run its course. See Stephen Carter, Rush to Lethal Judgment, N.Y. Times Mag., July 21, 1996, at 29; Sunstein, supra note [ ]. In some sense, the issue they raise lies beyond the scope of this article, which is about the content of the Establishment Clause, and does not venture into larger matters regarding the role of judicial review. But it can be observed in passing that the rationale suggested here, as opposed to the traditional, substantive due process or penumbral right of privacy rationale, for striking down laws against physician-assisted suicide, rests on a clearly-stated constitutional provision.
suicidal ideation. Perhaps it could go further, and provide coercive suicide prevention services for children whose parents request them. But efforts to coerce people to remain alive when they want to die go far beyond the accommodation of those who view suicide as sinful. Of course, universalistic religions such as Christianity assert that all people should belong to that religion, and that any alternative belief is sinful. For members of such a religion to live among people who do not share their views is to live among the sinful, which is undoubtedly upsetting. But that was precisely the source of Europe’s two centuries of violent war, and the reason why the Establishment and Free Exercise Clauses were enacted. Accommodation can mean many things, and may mean more with the current changes in the Supreme Court’s personnel, but it can never mean allowing members of one religion to impose their views on others.

Arguments that various laws, most notably laws prohibiting abortion, should be struck down because of their religious origins have been offered by others, most notably Ronald Dworkin, and Lawrence Tribe. But as both Dworkin and Tribe acknowledge, these arguments have foundered on the awkward fact that many laws — and indeed, the concept of law itself — originate in religious thought. No one would argue that we should hold that laws against murder violate the Establishment Clause because the prohibition is found in the Ten Commandments, or that we should declare the prohibition of slavery unconstitutional because it was first advanced by the Quakers, and carried forward by evangelical Christians. Tribe’s response to this is to abandon the argument in its entirety, while Dworkin tries to reconstruct it with a complex explanation that begins by asserting first that a fetus cannot be deemed a constitutional person, next that anti-abortion laws must thus be based on arguments about the intrinsic value of life, and finally that such views about life’s intrinsic value are religious ones because religion can be defined as a set of beliefs that addresses the issue of life’s intrinsic value.

101. Dworkin, supra not [ ], at 98-110.
102. Tribe, supra note [ ], at 21-25.
103. Dworkin, supra note [ ], at 105; Lawrence Tribe, American Constitutional Law 1349-50 (2nd ed. 1988).
104. Tribe, supra note [ ], at 1350. Tribe adds that laws against abortion may be based on secular morality, and that invalidating these laws because they are religiously based “appears to give too little weight to the value of allowing religious groups freely to express their convictions in the political process.” Id (footnote omitted). But striking down anti-abortion laws does not limit the ability of religious groups to argue against these laws, any more than striking down laws that allow warrantless wiretaps would prohibit people from arguing that such wiretaps are desirable.
105. Dworkin, supra note [ ], at 106-109.
Because Dworkin, unlike Tribe, tries to maintain the position that anti-abortion laws are unacceptable because of their religious origin, his argument merits some consideration here. To begin with, it rests on the highly contestable claim that a fetus cannot be a constitutional person,\textsuperscript{106} which is precisely the point that many anti-abortion advocates contest. Even if one grants that premise, Dworkin’s argument collapses back into the very assertion that he rejects, because the mere fact that views about the intrinsic value of life have religious origins does not preclude a legislature from adopting such views for secular reasons. Moreover, he invokes a questionable definition of religion that seems to have been selected for purposes of the argument. Standard anthropological and sociological definitions of religion include a shared or communal division of the world into sacred and profane,\textsuperscript{107}, a belief in higher powers and an attempt to propitiate them,\textsuperscript{108}, and the symbolic abstraction of magical efforts to manipulate the natural world,\textsuperscript{109}. Defining religion as beliefs about the intrinsic value of life is not unreasonable,\textsuperscript{110} but it is hardly a consensus position.

The argument advanced above does not rest on the general principle that laws against suicide have religious origins. Rather, it rests on an embedded social history, on an analysis that in this society, at this historical time, these laws enact the views of one particular concept of religion and run counter to the view of rival concepts. They thus align with one side in an ongoing religious debate within society and employ the coercive force of the state to impose that side’s view upon the other in a way that is simply not true for laws against murder or slavery. This is not an abstract claim, but a claim about our particular society – which is, after all, the society in which the American Constitution exists.\textsuperscript{111} In other societies, things would be

\textsuperscript{106} Id. at 87-90.
\textsuperscript{107} Emile Durkheim, The Elementary Forms of the Religious Life 51-63 (Joseph Swain, trans.) (1965)
\textsuperscript{108} James George Frazer, The Golden Bough 56-69 (1963)
\textsuperscript{109} Weber, supra note [ ], at 399-412 (The Sociology of Religion)
\textsuperscript{110} John Dewey advances this position in A Common Faith (1934)
\textsuperscript{111} Barry Friedman and Scott Smith, in an article that criticizes Supreme Court opinions and constitutional scholarship for failing to take cognizance of constitutional law’s historical development since the founding, praise the \textit{Glucksburg} decision – both the majority and the dissent – as an exception. See Barry Friedman & Scott Smith, The Sedimentary Constitution, 147 U. Pa. L. Rev. 1, 75-76 (1998). Their general point is an excellent one, but the argument of the present article is that awareness of history must be projected backward as well as forward. It is true, for example that we have developed a rich, complex history of free speech cases and commentary since 1789, and that an understanding of this history is necessary to make sense of the constitutional clause, but it also true that the concept of free speech possessed a long history prior to the time the Constitution was drafted, and that this history is in a very real sense
different. At one time, for example, the propriety of child sacrifice was socially contested, a contest that has left its trace in the Biblical story of Isaac and Greek mythology’s stories of Tantalus and Agamemnon. But we treat it as part of an unchallenged secular morality; it no longer reflects a religion-based conflict.

More generally, there is no particular set of issues that, as an abstract matter, is necessarily linked to religion, as anthropologists who have struggled with the definition of religion would concede. In some religions, for example, the particular type of food one eats is a matter of central importance, while in others it is largely irrelevant. The Buddhist religion places great emphasis on controlling one’s breathing, but Judeo-Christian religions treat this as an entirely secular concern. As noted above, even the significance of faith and ritual varies greatly from one society to another. The Romans were prepared, at least at certain times, to execute people for refusing to enact ritual sacrifices, but were quite unconcerned about their internal beliefs – indeed, quite content to allow people to declare their lack of belief while performing the required rituals. In the Middle Ages, Renaissance and Reformation eras, any sign of disbelief was punishable, often by death, but the failure to carry out religious rituals was regarded as a much less serious, and generally excusable offense.

C. Establishment and Assisted Suicide

The lack of a non-religious justification for anti-suicide laws is presumably at least part of the reason why laws against suicide have been entirely repealed in the United States; to this extent, the argument is moot. But laws against assisted suicide remain in force, continuous with the subsequent one, despite the dramatic event of codification in 1789. This is all the more true of suicide, which has been a issue of central concern for the entirety of Western history, but not mentioned in the Constitution, and not addressed by the Supreme Court until 1990.

113. 2 Robert Graves, The Greek Myths 25-26, 45-46, 291 (1955). Tantalus was said to have served Pelops, his son, to the gods because he was preparing a feast for them and had run out of food. Agamemnon’s sacrifice of his daughter, Iphigenia, is a more explicit reference to the practice of human sacrifice, since his purpose is to obtain favorable weather for a voyage.
115. Throughout this period it was much more serious offense for a Christian to maintain heretical beliefs, such as Albigensianism, than to fail to perform Christian rituals, because the former indicated a lack of belief in Christian doctrine, while the latter might only indicate venality or laziness. See, e.g., Heinrich Fichtenau, Living in the Tenth Century 400-01 (Patrick Geary, trans., 1991); Emmanuel Ladurie, Montaillou: The Promised Land of Error (Barbara Bray, trans., 1979).
and these laws are subject to the same objection.\footnote{116} As a general matter, if it is legal to perform a particular act, it is legal to employ an agent to perform that act on one’s behalf. Thus, laws prohibiting assisted suicide suffer from the same defect as laws against suicide themselves. Such laws represent the residual aspect of a religiously based prohibition. They make suicide more difficult for most individuals and impossible for at least a few, without any particular rationale except the cultural aversion to suicide that we have inherited from the Christian morality of higher purposes.

In a well-known article, Yale Kamisar argues that there are strong secular arguments against euthanasia.\footnote{117} Disclaiming any religious motivation, \footnote{118} he points to three major difficulties with mercy killing: first, that the attending physician may make mistakes about a sick person’s prognosis, second, that it may be impossible for a person to truly agree to his or her own death, and third, that apparent agreement can be obtained by outside pressure, specifically from family members who wish to end the emotional stress or financial drain of terminal illness.\footnote{119} In light of the more recent controversy that focuses on physician-assisted suicide, rather than euthanasia, Kamisar has reiterated and updated his arguments.\footnote{120} He adds a response to the argument that doctors are already terminating life and might as well be regulated when they do so.\footnote{121} Kamisar is unconvinced that the practice is particularly widespread and concerned that doctors will exercise uncontrolled discretion in implementing it.

While we can take Kamisar at his word that he himself is not religiously motivated,\footnote{122} the secular arguments he advances convey a
sense of post-hoc rationalization that suggests an underlying discomfort with suicide itself, a discomfort whose religious origin is readily identified in our society. All his primary arguments go to the question of consent, that is, whether the person who is requesting assistance in terminating his or her life really wants to die. This is undoubtedly a serious concern; a physician, or anyone else, for that matter, who terminates a person’s life without that person’s consent is committing murder. But it is not a problem that is intrinsic to assisted suicide or otherwise unknown to our legal system. Sexual intercourse without consent is rape; the acquisition of another’s property without consent is theft. In general, our entire legal system is centered on the idea that individual action is permitted unless it is specifically prohibited, and that individual action is something that people have consciously chosen to do or consented to have done to them.  

As a result, we have an extensive set of resources for determining the existence of consent, and most proposals for assisted suicide rely heavily on them. The standard way to ensure that a person genuinely consents to some treatment that would be undesirable in the absence of consent is to obtain explicit, objectively verifiable confirmation of the person’s decision.

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123. See Vera Bergelson, The Right to Be Hurt: Testing the Boundaries of Consent, 75 Geo. Wash. L. Rev. 165 (2007); Malcolm Thornburn, Justifications, Powers and Authority, 117 Yale L.J. 1070 (2008). Professor Thornburn states (id. at 1115) the reason why lack of consent is an important element of so many offenses is that the wrongness of the conduct in question lies precisely in the fact that it constitutes a usurpation of another person’s exclusive power to decide what shall be done with her body or property. Although a good deal of effort has been made over the years to explain such offenses purely in consequentialist terms (by suggesting that nonconsensual conduct is always more harmful than similar consensual conduct), this sort of argument has never gained much traction. Instead, it is now widely understood that all of these offenses are usurpations of another’s exclusive power to decide what shall happen to his body and property—and that the equivalent conduct, when undertaken with valid consent, is not wrongful (and needs no justification) because it is simply carrying out the other’s wishes. As such, consent affirms the other party’s power to determine the use to which his body and property may be put, rather than undermining it.

124. Professor Bergelson, supra note [ ], at 210-15, argues that murder is distinguishable from rape or theft because the underlying action, killing a person, is inherently wrong, unlike having sex or transferring property. She argues that this places a greater burden on the consent requirement, but is nonetheless willing to recognize consent as an excuse because of the value she attaches to personal autonomy. Meir Dan-Cohen contests the view that consent and autonomy are complete answers because of the social effects that extend beyond the individual. Meir Dan-Cohen, Basic Values and the Victim’s State of Mind, 58 Cal. L. Rev. 759 (2000). In their place, he proposes human dignity as a master value. The argument here has a separate basis in religious freedom; it invokes consent only to ensure that the other party is truly participating in a suicide. But it would also pass muster under Professor Dan-Cohen’s test, because assistance in committing suicide unlike being subjected to slavery or sadomasochistic treatment (Professor Dan-Cohen’s examples) is consistent with our concept of dignity. In fact,
statute regulating assisted suicide might require that the potential suicide be mentally competent, provide a written or recorded statement, and be orally examined by a neutral party. The statement, or the examination, or both, could be required at two different times to ensure that the decision was not the product of a passing mood or temporary disorder. This is certainly a lot more protection than the law provides in many other situations. People do not need to provide signed authorizations before engaging in sexual intercourse, and contracts for the transfer of property require only a single signature. In fact, people do not need to provide any formal indication of intention before taking their own lives. When state laws against suicide were repealed, legislatures could have provided that sanctions such as forfeiture would still be imposed if the person committing suicide failed to provide a signed declaration of intent prior to the actual commission of the act. But instead, suicide was de-criminalized in all cases, even when the act was taken when the person was in a temporary state of depression. Assisted suicide offers many more opportunities to ensure that the person genuinely intends to commit the act, because various obligations can be imposed on the assistant.

Kamisar’s argument relies heavily on cases where consent is problematic, such as the elderly, sick person who is being pressured by family members. This is, of course, precisely the situation where a person’s suicide may be more of a favor than a detriment to family members. We can, if we choose, add that the elderly person controls a large fortune, that the family members are impecunious sociopaths, that the treating physician has been secretly promised a large fee by these family members if they inherit, that the elderly person has a pathological aversion to disagreements with family members, and perhaps other details that would occur to people who regularly watch soap operas on TV. But all this only means is that we should be additionally careful about obtaining consent in these circumstances.125

The mere possibility of abuse is a fairly weak argument against a public policy, and an even weaker one against a constitutional consideration. The legal system is always required to draw lines to separate abuses from desired or protected behavior; re-labeling these lines as a slippery slope, which is what Kamisar and other critics do,126 can only be convincing if one can demonstrate that the lines are

the preservation of one’s dignity is often a major motivation for wanting to commit suicide, as the name of the Oregon Statute attests.


126. Kamisar, supra note [ ], at 113. See Smith, supra note [ ] (title is: The Slippery Slope from Assisted Suicide to Legalized Murder); Callahan & White, supra note [ ]; Marshall Kapp,
more difficult to draw in the area under discussion, and this is not the case.

It is perhaps indicative of Kamisar’s discomfort with suicide itself that he does not raise what might appear to be the most convincing argument about consent: that a person who truly wants to commit suicide would do so, and does not need to obtain a physician’s assistance. The easiest answer to this question is illustrated by two popular movies, Whose Life Is It Anyway? and Million Dollar Baby, involving quadriplegics who find life burdensome in this condition, although they are neither dying nor in physical pain. Unable to commit suicide themselves, as an uninjured person could, they demand that others allow them to make this choice by administering lethal drugs. As presented in these movies, the situation is a compelling one; both characters are unquestionably competent, their decision is unambiguous, and they have objectively understandable reasons for their choices, since both depended on physical movement for their purpose in life, one being a sculptor and the other a boxer.

But constructing an argument for assisted suicide on the basis of situations where assistance is required for the individual to take any physical action is not any better than constructing an argument against assisted suicide on the basis of those situations which may not be suicides at all. Both rely on empirical variations to sidestep the central issue. A more convincing answer is that most people who choose suicide are presumably anxious to avoid the pain and uncertainty of outcome that accompany amateur efforts. Even this


127. John Badham, Director (MGM, 1981)
128. Clint Eastwood, Director (Warner Bros., 2004)
129. In fact, the situation has greater generality than might initially appear, since many terminally ill people who decide to kill themselves are in hospitals, where convenient means of doing so are not readily available.
130. It is virtually obligatory to quote Dorothy Parker’s Resume at this point:
   Razors pain you;
   Rivers are damp;
   Acids stain you;
   And drugs cause cramp.
   Guns aren’t lawful;
   Nooses give;
   Gas smells awful;
   You might as well live.

Dorothy Parker, Enough Rope: Poems (New York: Boni & Liveright, 1926)
does not go far enough, however. The real answer is that the same arguments apply to assisted suicide as apply to suicide in general. Whether suicide is a viable option for an individual is a matter of deep moral division in our society, and the negative answer is clearly the product of a particular religion. The state may not coerce individuals to follow this religion unless it has a compelling secular interest in doing so. Thus, people should be allowed to obtain assistance in committing suicide in the same way that they are allowed to obtain assistance in carrying out any other legal act. The only reason not to allow such assistance is when it might raise questions about the genuine voluntariness of the person’s decision, and this can be addressed in the manner specified above.

Another argument against assisted suicide, sometimes raised in litigation and judicial decisions, is that the state has the authority, and perhaps the obligation, to protect the lives of its citizens. This is, however, too abstract and ambiguous a claim to be used in the context that its proponents suggest. While it is certainly sufficient to provide a rational basis for presumptively valid legislation, it cannot overcome the constitutional right to be free of religiously-based coercion. The state also has an unquestionable authority to advance the truth, and this rationale is sufficient for the creation of the National Science Foundation, the establishment of public universities, and even compulsory elementary and secondary education. But it cannot be used to overcome people’s constitutional right to speak, even if their speech consists of demonstrably false statements. If the government could defeat a claim of right by invoking vague, resounding phrases of this sort, none of our constitutional protections would be secure.

Given the analysis presented above, the real question is whether it is constitutional to place a variety of specific limitations on a person’s ability to obtain assistance in committing suicide, or whether such restrictions also impermissibly advance one particular religion and lack a sufficient secular purpose. Here, Kamisar’s arguments are more convincing. Since suicide is irrevocable, society has an obligation to ensure that the action is genuinely intended by


132. This is the argument that Ronald Dworkin addresses in *Dworkin*, supra note [ ]. Dworkin’s response is a derived from his argument against anti-abortion laws, see *Dworkin*, supra note [ ], namely that claims about the intrinsic value of life fall within a trans-cultural definition of religion.
the person. As the Supreme Court held in *Cruzan*\(^{133}\) there is a compelling interest in making sure that the person actually wants to die. Moreover, unlike the general proscription of assisted suicide or suicide in general, rules ensuring that the person genuinely consents to dying have no clearly religious origin. But assurances of consent can also go too far, and rise to the level of religiously-inspired coercion of the individual's personal choices.\(^{134}\) One fairly reliable way to ensure that a person genuinely consents is to require that his or he decision be objectively reasonable, that is, the sort of decision that an average person would make under similar circumstances.\(^{135}\) In the case of suicide, those circumstances might be that the person has a terminal illness and is in serious pain, as in the Oregon statute. But this represents too great an intrusion on a person's freedom of action to be justified as a truly secular restriction.

**D. Establishment vs. The Right to Die**

As stated at the outset, current arguments for declaring laws against assisted suicide unconstitutional generally rely on the idea that people have a right to die, alternatively phrased as a right derived from the general principle of personal autonomy. While readily comprehensible in theory, the effort to embody this idea in constitutional doctrine encounters formidable difficulties, difficulties that the Establishment Clause approach outlined above manages to avoid. This final section discusses the problems that the right to die presents. It does not challenge this concept from a philosophic perspective, nor does it assert any definitive argument against its constitutionalization.\(^{136}\) The point rather, is that reading a right to die

\(^{133}\) See *Cruzan v. Director, Department of Health and Social Services of the State of Missouri*, 497 U.S. at 280-84. See id. at 284: “[A] State may apply a clear and convincing evidence standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state.”

\(^{134}\) Id. at 261 (Brennan, J., concurring)

\(^{135}\) See *Cruzan* and the recent controversy regarding Terry Schiavo turned on the separate question of a living will, that is, whether the two women had given a sufficiently clear indication, before becoming non-functional that they would have wanted to die if they in fact suffered this fate. See U.S. Living Will Registry Website, www.uslivingwillregistry.com (visited on Jan. 14, 2006). Virtually no one would be willing to enforce a living will that provided for its execution when the person was still competent—“kill me if I don’t get tenure” – because the person can be asked “What do you want now?” But if the person’s consent cannot be obtained, and there is no living will, complex evidentiary problems are likely to arise. These may argue against killing non-functional persons, by either administering or withdrawing treatment, but it does not provide an argument against allowing mentally competent people to obtain assistance in committing suicide.

\(^{136}\) For criticisms of the right to die, and efforts to distinguish it from other rights regarding personal decision making, see Kreimer, supra note [ ]; Thomas Mayo, Constitutionalizing the “Right to Die”D’, 49 Md. L. Rev. 103 (1990); Marc Spindelman, Are the Similarities Between A
into the U.S. Constitution presents a number of difficulties when contrasted with the historically grounded Establishment Clause argument presented in the previous sections.

The most obvious difficulty is that a right to die, or a general right of personal autonomy for that matter, appears nowhere in the constitutional text. It is one of the penumbral rights that follow from the rationale of *Griswold v. Connecticut*\(^\text{137}\). In *Griswold*, the Court held that the first eight amendments combine to create a general right of privacy which could then be extrapolated to novel issues such as a married couple’s access to contraception. It was this same rationale, but grounded on the Fourteenth Amendment rather than the first eight, that was used to strike down state anti-abortion laws in *Roe v. Wade*.\(^\text{138}\) By that point, however, the characterization of the protection being provided as a right of privacy no longer possessed the same intuitive appeal. What a married couple does within the confines of their bedroom seems to fall comfortably under the rubric of privacy, but a woman’s right to a surgical procedure that is typically performed by a physician at a hospital or clinic seems like something else entirely.\(^\text{139}\) Thoughtful observers have thus pointed out that the right of privacy that Supreme Court jurisprudence has articulated is better treated as a right of personal autonomy regarding essential life decisions.\(^\text{140}\) While this formulation avoids a counter-intuitive use of language, it suffers from the same weakness of basing constitutional doctrine on a principle with no explicit textual support.

This is not necessarily a fatal objection; it depends on hotly contested questions of constitutional interpretation. If we are to be guided by a document that was written two hundred years ago and couched in vague and general terminology, there are strong reasons to acknowledge that the authors of the document could not have known the factual circumstances of our very different modern world, and are

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\(^{137}\) 381 U.S. 479 (1965)

\(^{138}\) 410 U.S. 113 (1973). For a general discussion of this line of cases, see Rubenfeld, supra note [ ].

\(^{139}\) For a thoughtful argument that reproductive rights are linked to privacy, see Allen, supra note [ ].

unlikely to have intended this unknown world to be governed by an interpretive approach that may not even have been appropriate to the world in which their words were written. Both constitutional originalists and constitutional textualists contest this view. Originalists would presumably take the absence of discussion about assisted suicide at the time that Constitution was drafted as an indication that laws prohibiting this practice should not be struck down on constitutional grounds. But the right to die rationale fares no better than the proposed Establishment Clause rationale from this perspective. Where the difference lies is from the perspective of a textualist approach. To put the matter simply, the right to die does


On this issue, the interpretation of the Constitution may be contrasted with interpretation of the Bible. According to believers, the Bible was written by people directly inspired by an omniscient deity who might well have known the precise nature of any future world, and the way that the written words would be interpreted by that world’s inhabitants. Any similar claim about the Framers of the Constitution would be factually absurd, and, from a believer’s point of view, arguably blasphemous.


143. For works propounding this approach, see, e.g., Gary Lawson, On Reading Recipes...And Constitutions, 85 Geo. L.J. 1823 (1997); John Manning, The Eleventh Amendment & the Reading of Precise Constitutional Texts, 112 Yale L.J. 1663 (2004); Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law (1997); Seth Tillman, A Textualist Defense of Article I, Section 7, Clause 3: Why Hollingsworth v. Virginia Was Rightly Decided & Why INS v. Chadha Was Wrongly Reasoned, 83 Tex. L. Rev. 1265 (2005); Adrian Vermuele & Ernest Young, Hercules, Herbert, and Amar: The Trouble with Intratextualism, 113
not appear in the constitutional text, whereas the prohibition against establishing religion clearly does. While either rationale for striking down laws against assisted suicide is controversial, a constitutional argument based on provisions that actually appear in the constitutional text must be less controversial than one based on provisions that must be read into the text by surmise or extrapolation. Many observers question whether penumbral rights are properly treated as constitutional provisions at all; no one questions that the Establishment Clause should be so regarded.

To be sure, the reading of the Establishment Clause suggested here, like most readings of that Clause, is hardly uncontroversial. All important constitutional arguments require interpretation of the text, and all are open to debate. One way to distinguish between two inevitably interpretive arguments, however, is to catalogue the number of controversial propositions that one needs to move from the premise to the conclusion. The argument proposed above depends on one such proposition: that laws against assisted suicide are exclusively designed to advance one religious view at the expense of others. The personal autonomy argument depends on two: that the Constitution establishes a right to personal autonomy, and that laws against assisted suicide violate that right.

This leads directly to the second major difficulty in arguing that laws against assisted suicide can be declared unconstitutional because they conflict with the right of personal autonomy. Autonomy is a capacious concept that derives rhetoric power from its broad applicability, but for that very reason presents serious conceptual difficulties.\textsuperscript{144} As a legal doctrine, it is over-stated, because our society tolerates innumerable restrictions on the autonomy of individuals that do not advance the autonomy of other individuals. As a moral principle, it is unacceptable because it denies the interconnected and communal character of society itself. The limitation used to make the principle coherent is that the intended autonomy refers to the individual’s control of basic life decisions regarding family structure, reproduction and existence. But it is far from easy to explain the theme that unites these disparate issues and divides them from other issues that might seem equally essential to an individual, such as

\textsuperscript{144} One example is Louis Seidman’s argument that “there is a right to life because life is the necessary precondition for individual autonomy The state's obligation to protect life is therefore not overridden merely because the individual decides to sacrifice her own autonomy.” Confusion at the Border: Cruzan, “The Right to Die,” and the Public/Private Distinction, 1991 Sup. Ct. Rev. 47, 73. By interpreting life as a precondition to autonomy, rather than a subject of autonomy, one can reach an opposite conclusion.
one’s career, the education of one’s children, the kind of medical care that one receives, the place one lives, or many other activities whose regulation is widely accepted in our society.

Moreover, to the extent that a coherent and properly delimited concept of personal autonomy can be articulated, assisted suicide would not necessarily fall within its ambit. To begin with, it shares with legalized abortion the difficulty that the right involved is the individual’s right to obtain the assistance of others. This is true as a pragmatic matter for abortion, but as a theoretical or definitional matter for assisted suicide. Second, the simplest theme that can be articulated to unify the existing right of privacy or right to personal autonomy decisions is sexuality, but assisted suicide is about as far from sexuality as a matter of human behavior can be.\textsuperscript{145}

Clarifying the idea of autonomy by invoking its philosophic origins will not get us any further. The concept is most closely associated with Kantian ethics, and specifically with Kant’s claim that genuine morality consists of a set of rules for conduct that individuals impose on themselves.\textsuperscript{146} It represents a radical break with prior concepts of morality, which focused on obedience to God’s laws or secularized natural law.\textsuperscript{147} The effect of this approach, at least in its pure form, is to separate morality from the public sphere and render public rules neither necessary nor sufficient for the individual. That is, the moral individual does not need external rules as a basis for proper action, nor do external rules justify action by the individual. Kantian ethics can be incorporated into a theory of the state through the plausible principle that the state should respect the individual’s moral autonomy, but this leads to general support for freedom of conscience, not to the delineation of any particular area of action which should be protected from public intervention.

The political theory that the only proper function of the state is to preserve individual autonomy, and thus to protect moral individuals from immoral ones, can of course be articulated.\textsuperscript{148} And this theory would certainly forbid the enactment of laws that prohibit assisted suicide. It is of little use, however, because it would also forbid the enactment of most other laws, and fails to distinguish laws against assisted suicide from laws

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\bibitem{145} The same result follows if one treats the sexuality decisions as embodying the principle that men and women should be treated equally. Restrictions on abortion necessarily restrict the freedom of women to a greater extent than they restrict the freedom of men. Restrictions on assisted suicide affect both sexes equally. See Kreimer, supra note \cite{145}.


\bibitem{147} See Schneewind, supra note \cite{145} at 483-530.

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providing public education, or protecting the environment or regulating pharmaceutical products, and so forth, all of which would be deemed improper under this approach. Once again, the problem is that the concept of autonomy provides no specific rationale for distinguishing assisted suicide from the vast array of other laws that regulate individual conduct in the modern state, and that few people would be content to sweep away in their entirety. A historically grounded approach to the Establishment Clause provides such a distinction, and explains why we might want to declare prohibitions against assisted suicide unconstitutional while continuing to accept other prohibitions as valid decisions of a democratic government.

CONCLUSION

Discussions of suicide, and of assisted suicide, have tended to focus on the right to die. This article suggests an alternative to this rather difficult argument. In the cultural context of Western civilization, the context into which the U.S. Constitution fits rather securely, prohibitions against suicide must be understood as religiously-motivated. They emanate from a particular interpretation of Christianity, one associated with the morality of higher purposes. This morality dominated Europe during the Middle Ages, Renaissance and Reformation eras, but it is now in retreat. It has been partially, although not entirely displaced by the modern morality of self-fulfillment. The morality of self-fulfillment does not prohibit suicide and in fact, would recognize it as a desirable, although not obligatory, under certain circumstances. Laws against suicide or assisted suicide thus represent coercive action by the government that impose the rules of a particular morality, one that happens to derive from religion, over another morality with more secular derivations.

The Establishment Clause is best read as prohibiting the state from favoring the doctrines of one religion over another, unless the prohibition has a secular basis independent of religious doctrine. Laws against suicide or assisted suicide have no such basis. The concern that allowing assisted suicide will offer an excuse for murder can serve as a secular basis for regulating assisted suicide, but not for its outright prohibition. Assisted suicide is distinguished from murder by the individual’s consent, the same principle that distinguishes sex from rape, exchange from theft, confession from duress, and a variety of other matters found throughout our legal system. This
Establishment Clause rationale is preferable to any analysis based on the right to die, because it is based on a much more explicitly stated constitutional command, and is more specifically tailored to the issue in question.