

DEATH, DYING, AND DOMINATION†

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This Article critiques conventional liberal arguments for the right to die on liberal grounds. It contends that these arguments do not go far enough to recognize and address private, and in particular structural, forms of domination. It presents an alternative that does, which is thus more respectful of true freedom in the context of death and dying, and also more consistent with liberalism. After discussing obstacles to the achievement of a right to die that encompasses freedom from both public and private domination, the Article closes with a significant reform project within bioethics that might help bring it about.

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What else can one do in the time before sunset?
—Socrates, in *Phaedo*

INTRODUCTION

All respectable accounts of liberalism recognize domination, both public and private, as the enemy of personal autonomy. Where domination obtains, autonomy does not.

Tracing and prioritizing one side of this line, liberal partisans in the “right to die”¹ debates have widely opposed laws barring individuals from

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1. The “right to die” has various meanings. I use the term in a broad sense—to include “active” and “passive” euthanasia in their various forms—unless otherwise clear from context.

making choices for themselves about the meaning and value of life, including whether it should be lived at all or abandoned. These laws are forms of public domination, untenable barriers to self-mastery, it is said. Happily, given the diagnosis, the solution is ready at hand. To give autonomy its due, the State must cease its domination. If it does, autonomy will predictably bloom.

What of private domination? It has not loomed as a major concern for liberal right-to-die supporters. To be sure, when pressed, they ordinarily grant that, when private domination ushers someone out of life, especially against a choice to live, not only life itself, but autonomy too is extinguished. By and large, liberals trust that that is precisely the sort of private domination the State should recognize and punish as a personal harm, as, for instance, it does through criminal homicide laws. Indeed, permissive right-to-die regulations invariably contain provisions arced in these very directions. By design, they aim to keep private domination, parked under the signs of “undue influence” or “coercion,” hence “harm,” “injury,” or “abuse”—perpetrated, paradigmatically, by one private actor against another—“outside” the regulatory regime. If the filter works, the machinery smoothly delivers only freely chosen death. On the conceptually related front of private domination keeping an individual *alive* who would otherwise opt for death, scarcely anything very useful has anywhere been said. This is true despite the fact that colorable examples alight the law reports, as they do the unpublished remainder of social life.

These two perspectives on domination, taken together, broadly frame the conventional liberal stance on “choice in dying.” The State, principally through forbearance, but sometimes through action, chiefly targeting private individuals who break the peace, can keep the twin forces of domination at bay. It thus ensures choices about life and death, whatever they are and however realized, are made under conditions fundamentally respecting autonomy. Hence the now-standard liberal case for the right to die.²

Behind this case, detectably animating it, is a certain, well-known (but imaginary) vision of social life. Parsimoniously described, it holds we are all free and equal persons capable of autonomous choice, particularly about life’s momentous events, lest kept from it by domination. Although public and private dominations are theoretically twin threats to autonomy, public domination’s dangers far outpace those of its corresponding private number. Given the State’s tendency to (try to) insinuate itself into every last nook and cranny of our lives, public domination is an ever-present danger requiring an eternal vigilance. By contrast, private domination, operating interpersonally—one private actor dominating another—is controllable and, thanks in part to the law, but also to morality, culture, nature, and reason, already controlled. It is a rare, incidental threat, and even less commonly, manifest as a fact of social life.

2. The most high-profile illustration of these tendencies may be the “Philosophers’ Brief” filed in *Washington v. Glucksberg*, 521 U.S. 702 (1997). Brief for Ronald Dworkin et al. as Amici Curiae in Support of Respondents, *Glucksberg*, 521 U.S. 702 (Nos. 95-1858, 96-110).

This portrait sets otherwise curious features of the liberal brief for the right to end one's own life into relief. Most significantly, it illuminates how freedom from public domination, never more than a necessary condition for autonomy, is so often taken by liberal right-to-die advocates as a sufficient condition for it. If accurate, eliminating public domination would clear what, as a rule, is an unobstructed path to autonomous choice. Likewise, this portrait casts light on why liberal proponents of the right to die have dedicated so many analytic energies to opposing State bans on "choice in dying" and why, comparatively, so very few to shagging its private barriers. This division of intellectual labor mirrors the perils for autonomy that the two forms of domination are believed to represent.

I. THE BASIC CRITIQUE

Almost everyone professes to believe that private domination should be kept at the margins of social life. Certainly, dedicated liberals do. Does liberalism require it? Look past the strictly interpersonal model of private domination—one private actor, acting entirely on his own, dominating another—that is familiar to liberals in the right-to-die debates. Notice instead the full range of private domination's operative modes, including its perhaps most common forms: ideologically driven, hierarchically arranged networks of private power that, in shadowy, State-like ways, govern social life, including its very boundaries. Each of these networks operates through organized, largely settled but still open-ended—hegemonic, but not totalized—rules and regulations, rights and privileges, duties and demands that, individually and together, amount to a truly private sovereign code. Their major contemporary forms, familiar to us all, include the often-intersecting social hierarchies of race, class (including professional status), sex (including sexuality), disability, health, age, religion, national origin, and citizenship status. Along with the ideologies that drive them, which they themselves reinforce, these social hierarchies are constitutive of the conditions of social life, including its final chapters—first dying, then death. For those whose lives, hence lives' ends, they shape, control, and define, there is nothing peripheral or incidental about them. For many, too many, private domination—structural domination—rules.

This disquieting survey of the social scene cracks open an important counter-perspective on the conventional liberal case for the right to die. If correct, its posture on the architecture of domination is deeply elitist. The view that freedom from public domination unlocks both a self-legislated life and a self-chosen death, with private domination figuring as only a rare threat that is amply addressed by ordinary background legal rules, holds true for virtually no one outside a small group of social elites, and perhaps not even them. Focused this way, the liberal right-to-die brief entirely misses what is true for everyone else. Private domination's structural forms remain firmly entrenched—governing the social world, dominating the choices made in it, including the most momentous ones, themselves including choices about life and death—even after public domination is rolled back.

Having missed that, the liberal brief for the right to die also misses what is next. Private structural domination can be expected to change dynamically, even to expand its control, as the State relinquishes its mastery over the social field. Appreciating that power adores a vacuum, Hobbes was right: The “perpetual and restless desire of power after power . . . ceaseth only in death.”³ Not a moment before.

Would that that were all. The descriptive problems with the liberal case for the right to die reflect a more thoroughly normative concern. The liberal brief for the right to die—far from simply failing to imagine domination’s architecture from a nonelite social perspective, far from simply failing to notice private domination’s structural forms, far from thus leaving them, including their capacity to change and grow, unacknowledged, hence unaddressed—in a prescriptive turn, affirmatively legitimates and protects them.

Here is how. Within the liberal case for the right to die, private domination, when recognized at all, is seen as a rare, strictly interpersonal threat to individual autonomy, manifest as social reality more rarely still. Partly because of this, and partly to guard against public domination being or (again) becoming a constitutive feature of social life, the liberal case for the right to die installs strictly private interpersonal domination as the limit of State intervention into the perceived world of autonomous choice. Except when personal autonomy is blotted out by strictly private interpersonal domination, the State has no warrant to act. Lacking one, it is supposed to hang back, leaving the world of autonomous choice, unimpeded, to turn.

What has happened to private domination’s structural forms within this study? The descriptive assessment of the liberal case for the right to die has already provided the answer. Private domination’s structural forms do not come up within its terms. Only strictly interpersonal domination, on domination’s private side, does.

Where have private structural domination’s various forms gone? Searching for them within the liberal brief for the right to die, one senses that they have been absorbed by its underlying, animating imaginary of the social world. Significantly, though, they appear to have been recast there as features of the social landscape that, whatever else they do, do not negate autonomy. As well, being nothing more than features of the social world—not forms of private *domination*—the State has no obligation to address them in ways that will vindicate autonomous choice.

To the contrary, because private structural domination is presumably the result of autonomous choices private individuals have made—themselves entitled to respect as such—the State not only has no obligation to address them, but rather, if anything, a duty not to. Else, it is back—loop-de-loop—to public domination.

Bringing these various strands together, the usual decision by liberal supporters of the right to die not to recognize private structural domination for what it is, and to erect barriers that protect its authority to operate unim-

3. THOMAS HOBBS, *LEVIATHAN* 161 (C.B. Macpherson ed., Penguin Books 1981) (1651) (updated language added).

peded and even to grow, is, in a normative register, a decision to legitimate and protect it, and thus to authorize its rule as a kind of sovereign law.

Hence my critique: The right to die, realized or respected chiefly, if not exclusively, by bringing public domination to an end, will not be, as its liberal interlocutors regularly imagine, a smooth, direct passing of sovereignty from the State into individuals' already autonomous hands. Yes, it may sometimes be that. If accepted, the liberal brief for the right to die would yank the State itself back, hence check public domination, achieving liberation of a sort for some social elites.

For those who do not inhabit the privileged peaks of the social world, it is something else again. It is a passing of sovereignty from the State over into the networks of private structural domination, which, for their part, liberated—perhaps with more power than before—do and will do pervasively what private domination, like all domination, does: negate autonomy. The conventional liberal right to die springs individual choice from public domination in the name of autonomy while casting it headlong into the vortex of private structural domination. Itself legitimated and safeguarded from the State's authority in the process, the liberal right to die is thus liberated to lord over individual choice. Recognized in the world in which we actually live, the liberal right to die vindicates *and* vitiates autonomous choice.

A quick reference to the case of Elizabeth Bouvia, the high-water mark of the right to engage in “negative” or “passive” euthanasia (or more bureaucratically: the right to terminate unwanted treatment invoked in a context where doing so would ordinarily result in death) should help concretize the point.⁴ Bouvia sought, and ultimately got, judicial recognition of a constitutional right to end her life. By any measure, she was in serious straits. From birth “afflicted with . . . severe cerebral palsy,” she was also quadriplegic.⁵ By the time of the case, her “physical handicaps of palsy and quadriplegia [had] progressed to the point where she [was] completely bedridden. Except for a few fingers of one hand and some slight head and facial movements, she [was] immobile.”⁶ She was thus “physically helpless” and “totally dependent upon others for all of her needs.”⁷ Though “intelligent[] [and] very mentally competent” (“[s]he [had] earned a college degree”), and once even married, “her husband [had] left her”; her parents, as well as her friends, unfortunately, abandoned her, too.⁸ On her own, she was “without financial means to support herself[,]” and, not surprisingly, homeless.⁹ The State's supererogatory assistance with efforts “to find her an apartment of

4. *See* *Bouvia v. Superior Court*, 225 Cal. Rptr. 297 (Ct. App. 1986).

5. *Id.* at 299.

6. *Id.* at 300.

7. *Id.*

8. *Id.*

9. *Id.*

her own with publicly paid live-in help or regular visiting nurses to care for her, or some other suitable facility ha[d] proved fruitless.”¹⁰

Various forms of structural domination—disability, class, and sex prominently among them—defined Elizabeth Bouvia’s life, hence shaped her evident wish to leave it. But nothing in the *Bouvia* court’s decision, which emphatically and repeatedly affirms her right to die, addresses any of them. Instead, dramatically, it offers this: “If a [constitutional] right [including a right to terminate unwanted medical treatment, even when doing so will certainly hasten death] exists, it matters not what ‘motivates’ its exercise.”¹¹ Not even when it is private structural domination that does.

In a single stroke, the *Bouvia* court erases the conditions of private structural domination, and their relation to Bouvia’s wish to die. By giving Bouvia the choice she requested—release from the State-inflicted “ordeal” of living life with treatment (a naso-gastric feeding tube, inserted and maintained against her will)—the court ensured she was liberated unto a full-faced, unmediated encounter with private structural domination, whose forms were validated, their grip strengthened, along the way. Amazingly, when it did, Bouvia persevered with life, anyway, though the court practically told her she was better off dead.¹² Not everyone has these heroic reserves.

To recognize that the liberal right to die does and would save individual choice about death and dying from public domination by sacrificing it to the forces of private structural domination,¹³ which are themselves unleashed and protected, hence allowed to grow, along the way,¹⁴ is, as much as anything else, to affirm the continuing resonance of the legal realist insight developed nearly a century ago to challenge *laissez faire* “freedom of contract.” At its core, the realist insight was that freedom from State control—public domination—is not really freedom at all when private structural dominations stand in wait to take over when the State retracts its regulatory claws.¹⁵ The truth was—and remains—far more complicated than that.

Liberal supporters of the right to die take an important step in the realist direction when they acknowledge that the State has a legitimate role to play in regulating strictly private interpersonal domination, or more, affirm that it should play that role. Their mistake is stopping there. With the realists, and consistent with their own liberalism, they should also recognize the liberal State’s duty to address strictly private interpersonal domination as an instan-

10. *Id.*

11. *Id.* at 306.

12. *Id.* at 304–05.

13. No prominent set of safeguards—proposed or enacted, including Oregon’s—is truly designed to deal with private structural domination.

14. See, e.g., John D. Arras, *Physician-Assisted Suicide: A Tragic View*, 13 J. CONTEMP. HEALTH L. & POL’Y 361, 386 (1997); John D. Arras, *The Right to Die on the Slippery Slope*, 8 SOC. THEORY & PRAC. 285, 302–19 (1982).

15. See, e.g., Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 11 (1927).

tiation of its more basic obligation to address private domination—no matter its form—to ensure autonomy’s very possibility.

The constructive observation that there are multiple sovereigns beyond the official State that govern the lives and deaths of the socially disadvantaged, which forms the basis for the critique of the standard liberal brief for the right to die, thus returns us to the bid that initially set us in motion. We should now have greater perspective on it than when we began.

The liberal State has two coequal obligations with respect to individual autonomy, including the autonomous choice whether to live or die, not one (or one with a small, if important, rider). It has a duty to respect autonomy by not engaging in domination of its own, as well as a correlative duty to protect autonomy from being eliminated by various forces of private domination.

Concretely, what this means for the liberal right-to-die brief is that it needs to be amended. It should call on the State to satisfy both of its obligations respecting autonomy. As a liberal brief, it should not advocate or defend a protocol that makes the State complicit with, by legitimating and safeguarding, private structural domination. If it does, it will wind up pervasively, if not entirely, vindicating dominated choices, which, whatever else they may be, are not autonomous choices at all.

II. CONSTITUTIONAL DIFFICULTIES

So, by liberalism’s own lights, the State has twin obligations, reflections of the twin forces of domination, respecting autonomy. Over here, it is supposed to ensure we are free from its own, public dominations. Over there, it is supposed to vouchsafe, as best it actually can, that we are likewise free from domination by private forces. If it does, hence if we are, then the choices we make, particularly about life’s momentous events—including its very meaning, value, and end—may be autonomous, assuming they otherwise are. Should it affirm all this, the liberal brief for the right to die could absorb—and survive—my concerns.¹⁶

With that problem solved, another is in view. In judicial hands, the Federal Constitution is lined up against the proposition that *ours* is a liberal State constitutionally required to eschew public domination, *and* to eliminate, hence, minimally, to oppose, private domination’s various forms. The notion that it is, including the idea that it must do this for the same reasons the liberal State must (to give personal autonomy its due), is presently best described as constitutional nonsense.

Let me explain why from a few different perspectives, angling my way toward the Supreme Court’s right-to-die cases, beginning with some general observations on the formal invisibility of private domination in the Constitution’s open fields—the terrain of ordinary economic and social regulation.

16. My critique here is not an external argument against the right to die, or more specifically, assisted suicide. Previously, it was. See, e.g., Marc Spindelman, *Legislating Privilege*, 30 J.L. MED. & ETHICS 24 (2002).

A. *The Negative Constitution*

Everyone who knows, knows that set of black letter rules holding that the Constitution is fundamentally “a charter of negative rather than positive liberties”¹⁷—a document designed “to protect the people from the State, not . . . from each other.”¹⁸ It is thus said that the Constitution entails no cognizable, hence enforceable, duty that the State must see private domination, much less address, attack, or eliminate it.¹⁹ Chief Justice William Rehnquist’s opinion for the Supreme Court in *DeShaney v. Winnebago County*, a case name that has become a, perhaps *the*, metonym for the Negative Constitutional State, encapsulates the point this way:

[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, [or] property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security. . . . [I]ts language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. . . .

Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual. . . . As a general matter, then, we conclude that a State’s failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.²⁰

Or, with Judge Richard Posner, “we [may] suppose, [a violation of] any other provision of the Constitution.”²¹ Within our current constitutional regime, the State has no general obligation to lift a pinky to protect us as individuals against the private dominations of others. That (ho-hum) is doctrinal rote.

So is this. The logic of the Negative Constitutional State *DeShaney* reflects is vast. It does not stop with private domination’s strictly interpersonal forms. *DeShaney*’s rule, specifically its holding that the State is basically not constitutionally obligated to acknowledge or address strictly interpersonal domination, but is ordinarily at liberty to do so or not, is based on, but would anyway imply, because derived from, a deeper and broader constitutional ground rule. The *reason* the State generally has no duty to address strictly private interpersonal domination is that it generally has no duty to

17. *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 812 F.2d 298, 301 (7th Cir. 1987), *aff’d*, 489 U.S. 189 (1989).

18. *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 195 (1989).

19. This is a rendering of the “adjudicated Constitution,” not of the Constitution itself. See Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 716 (1990).

20. *DeShaney*, 489 U.S. at 195–97 (citations omitted).

21. *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982), *quoted and discussed in* Robin West, *Unenumerated Duties*, 9 U. PA. J. CONST. L. 221, 230 (2006).

address private domination at all. That position is itself vastly overdetermined,²² but there it is. *DeShaney*, cohering the Negative Constitution's fault lines, thus speaks with equal force to the private interpersonal domination that reflects and reinforces, hence is a conduit for, one (or more) of private domination's structural forms. They, and with them, private structural domination writ large, are outside the Negative Constitution's obliging reach.²³

B. *The Negative Constitution and the Right to Die*

As long as *DeShaney*'s perspective on the Constitution's "nature" reigns, putting its non-bona fides aside, our constitutional State will have no obligation to address private domination, including its structural varieties. It thus need not move toward their elimination in order to ensure that individuals' choices, including choices about life and death, are not dominated. The idea that it must cannot be expressed as a constitutional norm, because descriptively, it is not one.

The corollary of the liberal State's obligation to address and eliminate private domination—that individuals have a right enforceable against the State to ensure they are not ruled by domination's private forms, including when making choices for themselves about life and death—is similarly constitutional babble. Positivistically, the Constitution does not countenance any such right.²⁴

DeShaney might not have made it plain enough that this is so even when life hangs in the balance. On its facts, after all, it only involved a life figuratively ended. The Supreme Court's more recent decision in *Town of Castle Rock v. Gonzales*, affirming and extending *DeShaney*, which did literally involve death, unmistakably did.²⁵ Had it not, Judge Posner would have dramatically registered the relevant point when, years earlier, he wrote that the Constitution guarantees us no protection against "being murdered by criminals or madmen."²⁶ Only somewhat more generally, it follows that there is no constitutional right to protection from private domination at the borderland between life and death.

22. Justifications have variously been dropped and tethered to constitutional history, text, structure, institutional practice, raw institutional power, judicial ideology, and character. Sources on each count are legion.

23. Fully consistent is *DeShaney*'s embrace of the view that the Constitution does not compel the State to address class domination. See *DeShaney*, 489 U.S. at 196 (citing *Harris v. McRae*, 448 U.S. 297, 317–18 (1980)). The same can be said of *DeShaney*'s position on patriarchal violence, hence sex-based violence, more generally: The State is not constitutionally obligated to oppose it. Measured by *DeShaney* itself, the State has no responsibility to notice that patriarchy or the sex-based hierarchy of which it is a part exists. It recognizes neither.

24. See West, *supra* note 21, at 230.

25. 545 U.S. 748, 751–54 (2005).

26. *Bowers*, 686 F.2d at 618.

This is why Chief Judge Michael Hogan's final decision in *Lee v. Oregon*,²⁷ apparently rejecting the substantive due process challenge mounted by some opponents of the right to die against Oregon's permissive assisted suicide law, was, at least in this respect, doctrinally right.²⁸ Judge Hogan conspicuously declined to credit the argument that Oregon's assisted suicide law unconstitutionally "deprive[d] [the terminally ill] of a right . . . to the protection of the [S]tate from coercion by others to take their own lives . . . by insulating physicians who comply with the [law] from criminal liability" for homicide.²⁹ The Negative Constitution, Judge Hogan seemed to recognize, does not ordinarily "encumber" the State with any requirement that it must offer individuals substantive legal protections, criminal or otherwise, against private domination, regardless of its form.

Oregon thus had—as the Supreme Court would later affirm in *Washington v. Glucksberg*³⁰—a constitutional "green light" to legalize physician-assisted suicide within fair terms if it rationally pleased, however it pleased. As part of its chosen legalization package, it could create whatever legal safe harbors it wished to, for physicians and others who did or would assist in "authorized" suicides. The State was constitutionally at liberty to immunize them from either criminal or civil sanctions (including sanctions for violating professional practice rules), or both. That is nothing more—as parties to the case recognized and argued, and as Judge Hogan himself appreciated—than the sum of *DeShaney*, hence the Negative Constitutional State, applied to the structure of the law surrounding death and dying.³¹

C. Exceptions to the Negative Constitution

But perhaps this presses the claim too emphatically. The logic of the Negative Constitutional State *DeShaney* embodies is unquestionably sweeping. But it is not inexorable. *DeShaney* itself does not profess that our

27. See *Lee v. Oregon*, 891 F. Supp. 1429 (D. Or. 1995), *vacated*, 107 F.3d 1382 (9th Cir. 1997) (Equal Protection Ruling). Judge Hogan did not immediately reject the substantive due process claim raised in the case. See *Lee v. Oregon*, 869 F. Supp. 1491 (D. Or. 1994) (Preliminary Injunction Decision).

28. See *Lee*, 891 F. Supp. 1429; see also Defendants' Memorandum in Support of Motion for Summary Judgment at 34–35, 41–43, *Lee*, 891 F. Supp. 1429 (No. 94-6467-HO).

29. Opening Brief of Intervenors Levin, M.D. and Shuck at 12, *Lee v. Oregon*, 107 F.3d 1382 (9th Cir. 1997) (Nos. 95-35804, 95-35805, 95-35854, 95-35948 and 95-35949). The same argument was made before the trial court. See, e.g., Brief in Support of Plaintiffs' Motion for Preliminary Injunction at 18, 65, 74, 93, *Lee*, 869 F. Supp. 1491 (No. 94-6467-HO); First Amended Complaint for Declaratory and Injunctive Relief at 30, *Lee*, 869 F. Supp. 1491 (No. 94-6467-HO); Complaint for Declaratory and Injunctive Relief at 13–14, 16, *Lee*, 869 F. Supp. 1491 (No. 94-6467-HO).

30. 521 U.S. 702 (1997).

31. Judge Hogan's decision that Oregon's law violated the Equal Protection Clause, because it irrationally underprotected the lives of the terminally ill, leaving them uniquely susceptible to deaths produced by the forces of private domination, is not flatly inconsistent with *DeShaney*. See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 197 n.3 (1989). But Judge Hogan's decision does rub deeply against *DeShaney*'s grain. Similarly, it flouts *McCleskey v. Kemp*, 481 U.S. 279 (1987), not to applaud *McCleskey*'s decision-principle.

Constitution never saddles the State with a duty to address private domination, only that generally it does not. By hypothesis, consistent with *DeShaney*, the State may be held responsible for private domination, hence may be constitutionally obligated to recognize and address it—even seek to eradicate it—in certain circumstances. But whatever these circumstances are, they must be—and remain—exceptional. The affirmative duties to which they give rise must be limited. And they must remain limited if the Negative Constitution is to retain its orientation as the framework for a rule of law that ordinarily brooks no demand that the State address private domination.

What does this mean for the possibility that the State has a constitutional obligation to tackle private domination? Might *DeShaney*'s exceptions—really, exceptions to the Negative Constitution's ordinary structure—be ample enough to encompass a requirement that the State set itself against, to meet, private domination's various forms?

I think not. *DeShaney* itself and, with it, its progeny loom large as obstacles to such a conclusion. But even if they did not, private structural domination is (presently) too widespread, too deeply woven into the fabric of social life, and so would require too much action by the State at too broad and too fundamental a social level, to address and end it, for it to be fully encapsulated by an exception that really is an exception to the Negative Constitution. To hold the State responsible for addressing private domination's different forms, the Constitution's orientation would have to change. It itself would have to become a different kind of charter of rights than it now is—one that might include the familiar “thou shalt nots,” but also, certainly, a goodly number of presently unfamiliar, indeed unthinkable, “thou shalt.”³²

Then again, it might be possible, using conceptual devices at our disposal, to chop private structural domination down to constitutionally manageable bite-sized pieces. If so, we might neatly fit those pieces—if not private structural domination in its totality—into the space available for recognizing that our Constitution may impose limited, affirmative demands on the State to deal with private domination.

Along these lines, one might borrow loosely from Michael Walzer³³ and venture that the right to die is (essentially) a medicalized right that should be encompassed within the State's exceptional obligation in the health care sphere to ensure that individuals' most basic medical choices, including choices about life and death, are not dictated by the forces of private domination.³⁴

32. David L. Bazelon, *Civil Liberties—Protecting Old Values in the New Century*, 51 N.Y.U. L. REV. 505, 513 (1976).

33. MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983). Walzer recognizes “medical care” as a “sphere of justice.” *Id.* at 19; *see also id.* at 86–91. He acknowledges “boundary” problems with his theory. *Id.* at 21.

34. *See, e.g.*, Patricia A. King & Leslie E. Wolf, *Empowering and Protecting Patients: Lessons for Physician-Assisted Suicide from the African-American Experience*, 82 MINN. L. REV. 1015 (1998).

Though not without its charms, this approach will not, finally, do.³⁵ The forms of private structural domination in the health care sphere that are currently recognized as calling out for elimination are unacceptably abbreviated. Just as significantly, as to those forms of private structural domination that already do make the list, it is difficult to see how requiring the State to eliminate them—even if only in the health care arena—could or would be a meaningfully limited, hence exceptional, constitutional project.

To see why, take one form of private structural domination: the social hierarchy of class. What would it take to pick off class domination in the ostensibly “limited” context of health care? How, more modestly, could the State neutralize its effects? A right to health care would, of course, be an indispensable start. But how narrowly and precisely defined would such a right have to be to be exceptional under the Negative Constitution? Would it really matter? Would any meaningful right to health care ever be modest enough to fit into the Negative Constitution’s scheme?

Or consider the social hierarchy (really, hierarchies) of race. Anti-race-discrimination rules already ostensibly manage the delivery of health care across the full range of its institutions and practices as they are conventionally understood. In their ideally robust—rather than their presently dried-up-and-withered—form, these rules are minimally required to ensure that white supremacy does not negate the autonomy of individuals’ medical choices, among them those involving life and death. Assuming these rules were themselves constitutionally required in this context, could they properly be described as limited exceptions to the Negative Constitution? What if protection against intentional discrimination, which is what these anti-discrimination rules mainly offer, is not enough? What if, to ensure that white supremacy does not master the health care sphere by defining individual choices made within it, racism’s patterned effects, in addition to its intentional forms, must be flummoxed? Would requiring affirmative steps to achieve *that* amount to a limited, hence an exceptional, constitutional demand?

Conceivably, one could describe these—and similar—projects in the health care sphere as consistent with the Negative Constitution. But functionally, in light of the social meanings that they carry—especially “inside” the law—they are more properly understood as being in conflict with it. If so, what is achieved by maintaining that they are not? Anything more than preserving the fiction that the Negative Constitution—and the freedom and equality it presupposes—yet waves?

Unclear, in any event, is how long the façade that it does could be maintained once these projects, designed to purge the health care sphere of private structural domination, were affirmed as constitutionally compelled. If they did indeed begin as limited and exceptional constitutional programs, they would not—and could not—remain that way for long.

35. *But see, e.g.,* THE N.Y. STATE TASK FORCE ON LIFE AND THE LAW, WHEN DEATH IS SOUGHT: ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT 125 (1994).

The simple explanation begins with Cardozo's cant: the "tendency of a principle to expand itself to the limit of its logic."³⁶ Eliminating private structural domination in the health care sphere to ensure that choices can be autonomously made does not in principle start or end there, but rather far exceeds that context.

This is partly because opposing private structural domination as a project "within" the health care sphere is exogenous to it. Its origins and points of return are ultimately elsewhere. Health care is just one domain where it pops up and plays out. But it is also partly because the health care sphere's boundaries are extremely porous and open-ended, if not horizonless. Domestically and internationally, "health" is regularly defined as nothing less than well-being,³⁷ thus implicating the full range of social conditions under which we presently live. In this light, aiming to eliminate private structural domination to protect the autonomy of health decisions, including life-and-death decisions, is already to aim to weed it out across the social board, if autonomy is to be liberated from its grip. There is no need to ask, How limited—how exceptional—is that? Dialed up by all the different forms of private structural domination, the answer is clearer still. It is neither limited nor exceptional. And that is just when the right to die is seen as a medicalized right. The very same conclusion—that these are major, affirmative constitutional projects we are talking about—is reached more quickly, and with fewer epicycles, if the right to die is understood as but one more social or political right.

Either way, anti-private-structural-domination projects, including those that open small, have a well-known tendency to go big. When they do—and they must in order to capture how private structural domination's various forms penetrate and define the entire social grid, negating autonomy wherever they travel—they are not containable within a limited exception to the Negative Constitution. For its part, the Negative Constitution thus stands in the way of recognizing how these forms of private domination must be seen and understood—holistically—to be resisted systematically, and brought, as much as the State can, to an end. Our current constitutional order binds us to, rather than liberating us from, them.

No matter. It is one thing to address these—or similar—possibilities aimed at squeezing various anti-domination rules (or some or all of them) into the Constitution's exceptional, affirmative demand space at the level of theory. (I will confess I do not know who knows the answer to the legal theological question, When is an exception no longer an exception? I do not.) But it is another matter to evaluate them in terms of institutional realities on the ground. Of course, the Supreme Court *could* create an exception to *DeShaney's* rule (now *Castle Rock's*, too) broad enough to allow it to start

36. BENJAMIN N. CARDOZO, *The Methods of History Tradition and Sociology*, in *THE NATURE OF THE JUDICIAL PROCESS: THE STORRS LECTURES DELIVERED AT YALE UNIVERSITY* 51, 51 (1921).

37. See, e.g., *Constitution of the World Health Organization*, in *BASIC DOCUMENTS* 1 (46th ed. 2006).

using the Constitution *somehow* to attack private domination by assigning responsibility for it—all or in significant installments—to the State, to ensure that the right to die may be a meaningful exercise of personal autonomy.

But will it? Sorry, what was that: a belly laugh? *Exactly*.

We all know why. The Supreme Court has not said much, particularly of late, that could reasonably be taken to signal that it is amenable to making the Constitution into a charter of affirmative rights against private domination's various forms. Not even to a limited extent. The trend, visible in *Castle Rock* and numerous other decisions, including *DeShaney*, both before and since, points—if anything—in exactly the opposite direction.

This is not merely to *kvetch* about the Roberts Court. It is a reminder that judges—conservative and liberal alike—share a certain role-specific disposition (or character or maybe just an allergy) that makes them start to itch, sometimes also twitch and sputter, at the suggestion that the Constitution, hence the Court, should be set against, in order to rewrite, the basic conditions of social life, including private domination's elimination.³⁸ Even the most left-leaning judge knows *Shelley v. Kraemer*³⁹ only goes so far.

Near-endless speculation has sought to pin this basic judicial conservatism, from which even the Warren Court was not all that radical a departure, at its source. Cause (whether singular or plural) may remain unclear, or at least be disputed.⁴⁰ What is caused—the result—is not.

There *are* limits—real, because those with power make them real—on the possibilities of achieving a liberal constitutional State whose very reason for being prominently includes protecting us against private domination's various forms. This is and will be true so long as the Constitution remains firmly and finally in the Supreme Court's hands. There is thus little—if any—chance for now and for the foreseeable future the Court will issue anything more than a grudging constitutional warrant for the State to hunt down private domination—too modest, in any event, to ensure at a minimum that the most profound choices we make in a lifetime, including whether to live or die, might be autonomous. Realistically, for now and into the foreseeable future, there is no chance that that the Court will issue a general warrant directing the State to ensure, to the extent it can, that that choices about life and death are autonomous. That's bank.

Without more, this prediction is all that is needed to hit my mark. It is—and for the foreseeable future will be—gibberish to speak positivistically of our State's twin constitutional obligations to address and (attempt to) eliminate public and private domination in order to ensure that individual choices, especially choices about death and dying, can be autonomously made. It may be clever, even appealing, as political theory. But it is not an

38. See, e.g., Robin West, *Katrina, the Constitution, and the Legal Question Doctrine*, 81 CHL.-KENT L. REV. 1127, 1134–46 (2006).

39. 334 U.S. 1 (1948).

40. The prominent sources variously cited as causes include ideology, morality, virtue, convention, politics, psychology, and institutional constraints (hence prudence).

observation bearing an actual, much less a one-to-one, correlation with any existing or soon to be existing positive, constitutional law command. Because there is no constitutional obligation for the State to address private domination, no matter its form, there cannot be. Nor, because of that, can there, constitutionally, be a liberal right to die that, grounded in respect for personal autonomy, entails freedom from public and private domination alike.

III. CONSTITUTIONAL PERMISSIONS

All this, to this point, is but part of a constitutional portrait. Because it is so far incomplete, it is a somewhat misleading one at that. By itself, without the remainder, to follow, filled in, it overall simply retraces the official line on ordinary economic and social regulation in the Constitution's open fields. Formulaically, the State has no duty to see, hence address or aim to eradicate, private domination. But, significantly, the State is not generally precluded from doing so either. Affirmatively, it is free within broad but not, finally, inexhaustible limits to address private domination should it rationally choose to. Or—if it would rather not—not.⁴¹ À la Hohfeld: On the workaday terrain of economic and social regulation, the State's relation to the elimination of private domination is by way of permission, not obligation.⁴²

In black letters, the State's relation to the cessation of its own domination is describable in exactly these terms. It may—but need not—halt public domination by reconfiguring the ordinary economic or social regulation that has produced it, typically by pulling itself back. Provided public domination is not constitutionally arbitrary, and it is not on the condition that there is some colorable reason for it, it is constitutionally allowed. Nothing constitutionally must thus be done to cut it out. Indeed, once the State has properly relied on its permission to dominate us in its decision to do so, it can keep on, refusing to check itself, without offering any further (read: new) justification.

Altogether, then, on the terrain of ordinary economic and social regulation, neither of the liberal State's obligations respecting domination, themselves grounded in respect for individual autonomy, is constitutionally entailed. Our constitutional State may ignore, consider, weigh, balance, and position them in relation to one another, revising its prior calculations if it chooses to, or not, within nearly unbounded limits of constitutional reason. In some instances, that is no constraint at all.

41. The imperative to state a caveat here has grown as the State's constitutional authority to address private domination has become markedly variegated on multiple doctrinal grounds, including those that deny the federal legislature even the permission to choose to address private domination.

42. Cf. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 710 (1917).

Were illustration of the open-endedness and malleability of the State's authority required, *Washington v. Glucksberg*⁴³—ultimately decided as an ordinary social regulation case—would supply it, and in the context of the right to die. The State, *Glucksberg* declares, has a valid permission to address private domination—strictly private interpersonal domination and private structural domination alike—by banning assisted suicide.⁴⁴ This is not because outlawing assisted suicide will strike a direct blow against private domination, particularly its structural forms. No, it is that lifting the ban might rationally be thought to give private domination, generally, a boost. As the prohibition against assisted suicide is lifted, private domination is given new social space to occupy, and a new legal institution—the assisted-suicide-permissive regime, including the individual choices made within it—to rule. Private domination thus obtains a legitimated and enhanced dominion over life itself, what Michel Foucault called “biopower”⁴⁵: classically, the power of the sovereign to decide who lives, who dies, and when, why, and how.

Glucksberg announces that the State may preclude this escheat by preserving its own exclusive authority over assisted suicide, hence life that would be ended this way. Of course, authorizing the State to criminalize assisted suicide, which *Glucksberg* does, gives the right to be free from public domination in choices about one's own life and death short shrift. *Glucksberg* famously refuses to give that right constitutional standing. But remember, the State is not *required* to ban the practice, only allowed to do so. Following the State's lawyers' concessions in the case,⁴⁶ *Glucksberg* underscores that the State is at liberty either to prohibit *or* to legalize assisted suicide. It may—but need not—go either way. Nothing in *Glucksberg*—nor, for that matter, its companion case, *Vacco v. Quill*⁴⁷—unsettles the view that the Constitution does not compel the State to chase after private domination. Indeed, recognizing the State is at its pleasure to seek to or not, *Glucksberg* and *Quill* conform and uphold it.

The State's relation to public and private domination, and theirs, each to one another, thus has a certain form on the field of ordinary social and economic regulation. But that relation is reconfigured, hence takes on another form, as the field on which it sits changes, toggling over to become the field

43. 521 U.S. 702 (1997).

44. *Glucksberg*, 521 U.S. at 731–32. *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 281 (1990), affirms the point at least with respect to strictly private, interpersonal domination. See *infra* text accompanying notes 61–63.

45. 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION 140–45 (Robert Hurley trans., Vintage Books 1990) (1976).

46. See Transcript of Oral Argument at 9, *Glucksberg*, 521 U.S. 702 (No. 96-110), reprinted in 253 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 894 (Gerald Gunther et al. eds., 1998); see also Transcript of Oral Argument at 8–9, *Vacco v. Quill*, 521 U.S. 793 (1997) (No. 95-1858), reprinted in 255 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW, *supra*, pt. 2, at 876–77.

47. 521 U.S. 793 (1997).

of individual—or at least, unenumerated individual—rights. When it does, the State's permission to cease its own dominations quits being permission. It gets a promotion, becoming instead a constitutional command: a duty to respect the individual's right to make certain decisions free from the grip of the State's grubby, dominating hands. At the same time, the State's permission to oppose private domination receives the opposite treatment. It is demoted. More exactly, in some ways, it evanesces, in others, it completely disappears.

To be sure, none of this happens in those cases in which there is harmony between the right to be free from public domination—achieved by State forbearance, itself constitutionally required—and the right to be free from private domination—achieved significantly through State action, itself at most only ever constitutionally allowed (without being compelled). The State may discharge its constitutional obligation and legislate its permission—both at once—just in case obligation and permission converge.

A serviceable model for this type of convergence is found in State efforts designed to ensure that class hierarchy does not rule the exercise of constitutionally protected individual rights. A common method for achieving these ends is for the government to provide economic subsidies to those at or near the bottom of the economic well. Typically, these subsidies are said to enhance choices that are already constitutionally guaranteed, though the enhancement itself is not. And no wonder. These economic subsidies mitigate, if they do not entirely eliminate, the effects of class domination on individual choice.

There are of course doubters who, for different reasons, would gladly challenge this picture.⁴⁸ But there is no need to get hung up on this particular example to register the broader, descriptive, doctrinal point. It, in any event, remains unchanged. Where the State's constitutional obligation to respect the individual's right to freedom from public domination syncs with, hence is enhanced by, its decision—consistent with its constitutional permission—to pay respects to the individual's extra-constitutional right to freedom from private domination, freedom from State action and freedom through it may both, together, simultaneously be pursued.

The same cannot be said when the constitutional right to be free from public domination and the liberal right to be free from private domination diverge from one another, then clash.⁴⁹ In these cases, the State's constitutional obligation not to dominate us overtakes its permission to address strictly private interpersonal domination, whittling it down, while doing

48. See, e.g., ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 272 (1974).

49. Lawrence Sager finesses these moments of divergence in LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE (2004). His brief discussion of physician-assisted suicide, for instance, *id.* at 208–211, avers that its legal status “is dominated by practical concerns,” *id.* at 208. No analysis of them—including, for instance, how freedom from public domination and freedom from private domination might conflict with one another in the context of assisted suicide, or the right to die, more generally, nor how they actually do—follows.

even more to the State's usual permission to dislodge private domination's structural forms. It is deoperationalized, wiped out.

The narrowing of the State's authority to address strictly private interpersonal domination, along with the erasure of the State's authority to address private structural domination, is, much as anything else, a product of the social imaginary that provides the internal logic that coheres the domain of individual—or, again, at least unenumerated, individual—rights. We already encountered this imaginary in the context of the standard liberal case for the right to die. In salient detail, now transposed into constitutional form, whence, in part, it originally came, it holds that we are all free and equal persons presumed capable of autonomous choice. Strictly private interpersonal dominations, which would negate our autonomy, are thought typically held in check by a series of social forces, including legal ones. These forms of domination are thus imagined to be a rare threat, manifest more rarely still. For its part, private structural domination, being part of the backdrop of social life, is not a phenomenon that needs to be contended with at all. Presumably, it is the result of the choices that individuals, as autonomous decision makers, make—which are, because autonomous, entitled to respect as such.

The State, in consequence, retains the authority to address strictly private interpersonal domination. But that is the limit of its permission to address private domination. Overall, it is the point at which it fizzles out. Respecting autonomous choice within this conceptual rubric substantively means respecting the individual's right to make certain choices for himself unencumbered by State interference, including State efforts aimed at opposing private structural domination.

A more finely grained assessment of this portrait and how it—hence the Constitution—structures individual rights decisions reveals that even the State's authority to regulate strictly private interpersonal domination is not as freewheeling as at first blush it appears. The State does indeed retain its permission to regulate strictly private interpersonal domination. But, reflecting the portrait of social life that is the touchstone of this bit of constitutional turf, the State may fully engage it only when it can (and does) prove in individual cases that the ordinary presumption that individual choices are autonomous does not hold.

This presumption, being constitutionally grounded, cannot be legislatively disestablished wholesale. Nor can it be replaced with a different presumption, certainly not its reverse. The State could not, for instance, generally presume that constitutionally protected choices are not autonomously made unless and until, for example, they have been proved to be in court. Similarly, the State may not demand that a person it would seek to hold legally liable for negating another person's autonomy establish—as by an affirmative defense—that he did not. Without question, it cannot ratchet up the stakes even more than that by requiring that the defense be estab-

lished only by a high-certainty legal standard.⁵⁰ If it could, the question, internal to this realm, would be, What is the point of recognizing a constitutional right to be free from public domination to begin with? Why do so at all if the State effectively retains the authority to nullify it so easily? To ensure that freedom from public domination remains a meaningful right, cases of doubt—Was there private interpersonal domination? Was individual autonomy thus negated? Or in more conventional terms: Was there thus “harm”?—are thus constitutionally to be resolved against the State, not in its favor. The benefit of the doubt goes to any individual the State might seek to trap in its snares.⁵¹

Stepping back from the grainy details, the picture that emerges looks like this. The Constitution affirmatively and substantively protects a significant “tolerated residuum”⁵² of strictly interpersonal domination, comprised of private domination that cannot legally be seen, hence cannot be regulated or eliminated. Unproved, against a baseline that presumes it not to exist before it can be affirmatively shown to, it is not domination the State may constitutionally address. If anything, the State is constitutionally obligated not to. A far cry, to say the least, from what the Constitution allows the State to perceive and then do on the field of ordinary economic and social regulation. Still, it is like it in an important, though limited, sense. In neither of these constitutionally defined arenas does the State have an affirmative obligation to set itself against private domination. Once again, too bad.

The Ninth Circuit’s en banc opinion in *Compassion in Dying v. Washington*,⁵³ written by Judge Stephen Reinhardt, nicely captures this collection of points. Early on, the court suggests it need not decide any question about the State’s authority to regulate strictly private interpersonal domination.⁵⁴ Right-to-die advocates who instigated the case, the court explains, sought to avoid any direct attack on the State’s authority—its permission—to address it. They thus left undisavowed, hence unchallenged, that portion of Washington’s assisted suicide ban aimed at preventing one individual from knowingly “causing” another to commit suicide. By their own lights, right-to-die advocates were only impugning that part of the law damning the provision of “aid”: assistance in vindicating what they, along with the Ninth Circuit, saw (not unproblematically) as a “voluntary,” as in an autonomous, as in a non-dominated, exercise of the right to die.

In the course of assessing *that* claim, the court does ultimately pass on the ongoing validity of the State’s permission to address strictly private interpersonal domination, in the face of the constitutional right it affirms. Recognizing a clash, it offers that the State may continue to regulate, even

50. For a related example, with detailed illustrations, see Marc Spindelman, *Surviving Lawrence v. Texas*, 102 MICH. L. REV. 1615, 1648–64 (2004).

51. Special rules may exist for those who lack any capacity for autonomy.

52. The term is from DUNCAN KENNEDY, *SEXY DRESSING ETC.* 137 (1993).

53. *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) (en banc), *rev’d sub nom.* *Washington v. Glucksberg*, 521 U.S. 702 (1997).

54. *See id.* at 794, 797 & n.8, 832.

punish, attempts by private individuals to compel the exercise of the right to die, hence of course, their successes. But this is not the same permission as the State previously had. Its scope has changed. Consistent with the court's decision, the State is now precluded from presuming, as the assisted suicide law's prohibition on assisting death did, that death itself, at least death achieved by these means, is harmful to the individual, and that it therefore should be treated as a legal harm, hence be outlawed.

As a rule, the State may only punish harm like this when it can establish that a harm was inflicted—a factual showing it must actually make. To prove its case, the State must overcome the constitutional presumption the *Compassion in Dying* court embraces, repeatedly, by example: that the right to die, when exercised—indeed because it is exercised—is autonomous, hence harm free and entitled to the State's respect as an autonomous choice. A sizeable tolerated residuum of strictly interpersonal, private domination—made up of all the violations of individual autonomy that are, within this framework, unprovable and unproved—is, in consequence, constitutionally preserved.

The State's permission to deal with strictly private interpersonal domination is, then, seriously constricted in the realm of constitutionally protected individual choice. But it remains, relatively speaking, fairly robust, at least when compared to how the State's authority to deal with private structural domination fares there.

Unlike strictly interpersonal domination, private structural domination is placed beyond the State's notice and reach—the State's permission to move against it is trumped—when it does not harmonize, but instead conflicts, with a constitutionally protected individual right.⁵⁵ Directly, the State may not regulate a constitutionally protected choice—a choice that is protected *from* State domination—in order to prevent private structural domination from mastering it, so that, in turn, personal autonomy might be vindicated.⁵⁶ Not even when the regulation ultimately stops short of an outright ban on choice, preserving, finally, the individual's right of self-determination. No matter that the State is truly trying to protect choice from private domination, as opposed to, say, pretending to, as a paternalistic rationalization for publicly dominating individual choice in personal autonomy's (or freedom's) name.⁵⁷

The State's ability to accommodate in full-blown form what liberalism sees as two facets of the same underlying principle—the right to be free from public domination and the liberal right to be free from its private forms, both grounded in respect for personal autonomy—is thus, to this extent, constitutionally foreclosed. Once the State has a constitutional

55. Arguably, a rare exception appears in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 887–98 (1992) (joint opinion). The usual approach also appears in *Casey*. See *id.* at 885–87.

56. Exceptions do exist. See, e.g., *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987).

57. *Gonzalez v. Carhart*, 127 S. Ct. 1610 (2007), misses the difference.

obligation not to dominate us in some particular way, its ordinary permission to keep choices from being subject to private domination's structural forms is not merely diminished as its usual permission to address strictly interpersonal private domination is. It's toast.

The Supreme Court's opinion in *Glucksberg* (alas) ritualistically engages this dismissal without bothering to notice that that is what it is doing. The *Glucksberg* Court is aware of the phenomenon of private structural domination, just as it is aware of the State's ordinary permission to counter it. (Remember the Court's declaration that the State may exercise its permission to combat private domination, particularly private structural domination, to ban physician-assisted suicide?)⁵⁸ Still, the *Glucksberg* Court manages to ignore private structural domination itself, along with the State's usual authority to address it, once it has found that terminal sedation (a medical procedure that David Orentlicher,⁵⁹ with others, insists is a form of active voluntary, or "slow," euthanasia) is protected as a matter of constitutional right.⁶⁰ From aught that is found in the various opinions delivered in the case, the right to terminal sedation cannot be eliminated, limited, or regulated in the name of opposing private structural domination.

In this sense, *Glucksberg* repeats itself. Though there is a good deal *Glucksberg* has to say about *Cruzan v. Director, Missouri Department of Health*,⁶¹ along the way to reaffirming it, there is not a word on the prospect that private structural domination, and hence the State's ordinary permission to eliminate it, is implicated by *Cruzan*'s holding. It is almost as if the Justices who, in one part of the Court's opinion, understand how private structural domination is implicated by a right to assisted suicide cannot sustain that understanding to see how it is likewise implicated by the right to refuse unwanted treatment, including lifesaving artificial nutrition and hydration, that *Cruzan* announced.⁶²

This might seem odd were it not stare decisis elegantly performed. The various opinions in *Cruzan* are, to a number, likewise marked by their complete elision—no mention, no analysis—of the structural forms private

58. *Glucksberg*, 521 U.S. at 731–32.

59. David Orentlicher, *The Supreme Court and Terminal Sedation: Rejecting Assisted Suicide, Embracing Euthanasia*, 24 HASTINGS CONST. L.Q. 947, 955–56 (1997).

60. To speak of the right to terminal sedation is but one way to specify the *Glucksberg* Court's decision to constitutionalize the doctrine of double effect. See Yale Kamisar, *On the Meaning and Impact of the Physician-Assisted Suicide Cases*, 82 MINN. L. REV. 895, 904–05 (1998). Even if that doctrine should turn out not to entail a right to terminal sedation as such, see Norman L. Cantor, *Twenty-Five Years After Quinlan: A Review of the Jurisprudence of Death and Dying*, 29 J.L. MED. & ETHICS 182, 187 (2001), or a more general right to pain relief that itself includes a right to terminal sedation, or at least a right to some forms of terminal sedation, the point I am making remains.

61. 497 U.S. 261 (1990).

62. Technically, Chief Justice Rehnquist's opinion in *Cruzan* only assumed the existence of this right. Still, counting heads, including Justice O'Connor's, it is fair to say "announced." *Cruzan*, 497 U.S. at 287–89 (O'Connor, J., concurring).

domination can and does take.⁶³ Perhaps this is because Nancy Cruzan herself—a disabled woman dependent for her very existence on expensive medical interventions—was in a persistent vegetative state, and so it was thought she could not have been encumbered by private domination in any way. (Naturally, it could not have been that her condition put her more completely at their mercy.) Whatever one wishes to say on that score, nowhere does *Cruzan* come close to suggesting that the right to refuse treatment—a right that competent persons are free to enjoy, and that Nancy Cruzan and other incompetent patients receive by extension—even potentially implicated the forces of private structural domination.

This is not happenstance. It is of a piece with, indeed, it is a manifestation of, the logic of the terrain of constitutional individual rights. It cannot be written off as “merely” the product of an ideologically conservative Supreme Court. That this is so is brought out forcefully and vividly by the Ninth Circuit’s en banc opinion in *Compassion in Dying*. In a passage that arrives long after the court has declared that the Constitution forbids the State from dominating the right to die, including the right to assisted suicide,⁶⁴ Judge Reinhardt’s opinion savages the view that the State might constrain—or worse, obliterate—the right to assisted suicide in order to prevent private structural domination from gaining a handle on it. An earlier panel decision in the case, written by Judge John Noonan, had credited precisely this view.⁶⁵ For Judge Reinhardt, the idea that combating private structural domination is an adequate justification for the State’s prohibition of the practice is much more than unpersuasive. It is “disingenuous,” “fallacious,” “meretricious,” and “ludicrous on its face.”⁶⁶

The en banc court’s indignation is unmistakable. But so is what its opinion does. By adopting the conventional liberal brief for the right to die, it guarantees that individual choices about life and death are liberated from public domination only to ensure they are ruled by private structural domination’s various forms. What follows from that is this: Even in a liberal court’s hands, our Constitution is deeply hostile to liberalism. The only surprising news (maybe) is that this hostility is so readily apparent on the terrain of individual rights—the very terrain many have long supposed *proves* the Constitution’s liberalism. Another shibboleth is gone.

63. This is not to say *Cruzan* entirely missed strictly interpersonal private domination. *Id.* at 281 (majority opinion).

64. Or, presumably, any other form of it. *See* *Compassion in Dying v. Washington*, 79 F.3d 790, 814–16, 832 (9th Cir. 1996) (en banc), *rev’d sub nom.* *Washington v. Glucksberg*, 521 U.S. 702 (1997).

65. *See* *Compassion in Dying v. Washington*, 49 F.3d 586, 592–93 (9th Cir. 1995), *rev’d en banc*, 79 F.3d 790 (9th Cir. 1996), *rev’d sub nom.* *Glucksberg*, 521 U.S. 702.

66. *Compassion in Dying*, 79 F.3d at 825. Claims to the contrary notwithstanding, *see, e.g., Glucksberg*, 521 U.S. at 731–73, *Glucksberg* affirms the logic of this passage. *See supra* text accompanying notes 57–61. So do countless other “right to die” decisions.

IV. SOME HOPE?

Anyone who believes the State must exercise authority over private domination if it is ever seriously to make good on its duty to ensure autonomous choice is not blotted out, is bound to be concerned by what happens to the State's permission to address private domination on the terrain of individual rights. That the State's permission to address strictly private interpersonal domination is severely constrained, and that its permission to address private structural domination is wholly eliminated, seems, put mildly, to be wildly amiss. If individual rights deserve constitutional respect because the choices they implicate are so basic they must be protected from domination, what difference does it make whether the domination is public or private? What difference does it make if the private domination is strictly interpersonal or structural? None and none.

If that is right, how could it possibly be, as a matter of principle, that the State has a constitutional duty to address public—and only public—domination? That the State has a constitutional duty to address public domination that functions to actively chisel away at, and in important ways, to demolish, the State's permission to address private domination's various forms? And that is to say nothing about how this constitutional setup legitimates, hence approves, hence enhances, because it substantively protects, the private domination—both strictly interpersonal and structural—that is constitutionally placed beyond the State's reach. For its part, the constitutional authorization it receives to negate autonomy only makes matters worse.

No need to hem or haw: The liberal view of individual rights—specifically, that there is a right to be free from the twin forces of domination that are autonomy's enemies, including in the choices we would make about life and death themselves—does not register constitutionally as anything other than nonsense.

Normatively problematic, no constitution worthy of being described as a fundamental charter of a people, hence their government, hence the rights it must respect—no constitution that is truly committed to personal autonomy—could be so openly at war with the State's obligation to reign supreme over private domination and to do what it can to do something about it. Any version that is, needs to be edited, revised, changed. Even ours, which is, hence does.

But how? What is to be done when the liberal right to be free from public domination collides with the liberal right to be free from private domination? How should the clash be handled? Should it be settled in the abstract? In concrete cases, as with the right to die? Or piecemeal: one way, for instance, for refusal of treatment, another way for terminal sedation, and yet another way for physician-assisted suicide? Would these be principled decisions? Is the right to be free from public domination or the right to be free from private domination to be accorded lexical priority over the other across the board? If so, which one? Why? Should the ordering be more contingent than that? Dependent, for instance, on background social facts? If so,

how should those facts be noticed institutionally and taken into account? Which institution, or institutions, of government should consider and evaluate them in the first instance, and with what claims to deference when they do? What happens if and when the facts on the ground change? Who is to say they have? Does the ordering, hence the constitutional reconciliation, that depends on them change, too? Or, does the ordering depend, more durably, on appeal to some other value? If so, what “external” values make the list? That is just the opening volley. More questions, more difficulties, and more challenges follow.

Answers are not required for at least this much to be said. These questions and the ones they spawn, though live, legitimate, and pressing, have effectively been rendered inaccessible and unavailable by constitutionalism’s current analytic structure. That alone renders it substantively problematic. In its present form, constitutionalism may not affirm that freedom from private domination is as necessary for personal choice to be autonomous as freedom from public domination is. It may not recognize that freedom from both forms of domination should be understood as constitutionally protected if the Constitution does, indeed, recognize respect for autonomy as a fundamental value. But that does not mean it is right.

If autonomy truly is a value the Constitution is meant to serve, there is no principled reason to give the right to be free from private domination any less respect as a constitutional norm than the right to be free from public domination receives. If that point and nothing else were taken seriously, the State’s obligation to deal with private domination might amount to more than a mere permission—when that. It might stand on its own as the equal of the State’s obligation to forbear from dominating the choices that are deemed central to the course of a full, human life. It should.

Meanwhile, it is not. The liberal State’s twin obligations respecting domination are not twin obligations our State has as a matter of constitutional law. On one level, that, of course, is mere description of brute, black letter law-fact. On another level, it is a powerful reason to reconsider the analytic structure, hence the structure, of our constitutional regime so it no longer is. So that, positively, the State is constitutionally authorized—even obliged—to guarantee, as much as the State ever can, that our choices, especially about fundamental matters, including the meaning and value of life—notably whether it should be lived at all or abandoned—may be autonomously made, undominated by the State and its private counterparts.

Hence a project known as “progressive constitutionalism,” which aims to deliver on that liberal ideal by making some basic adjustments to constitutionalism as it is locally (I nearly said “parochially”) practiced and understood.⁶⁷ Set in motion, progressive constitutionalism would govern by

67. The new classics include LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004), SAGER, *supra* note 49, MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (2000), and ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* (1994).

bringing our constitutional State more perfectly into alignment with liberalism's own.

It would not accomplish this end, it should be said, by expanding the current rule by courts. Rather, it would do so by (re)consecrating the legislature—the Congress—as the Constitution's principal and final interpreter. Under the progressive Constitution, the legislature, with some help from the courts (not the other way around), would take the lead in recognizing, defining, and enforcing constitutional—including progressive constitutional—norms. In this sense, borrowing Robin West's language, our "adjudicated Constitution" would become a "legislated Constitution."⁶⁸

Significantly, of all progressive constitutionalism's various ways of paying out, the big reward, certainly for present purposes, is the prospect it holds out, of putting in hand constitutional possibilities the adjudicated Constitution presently keeps firmly—largely, if not entirely—out of reach. Chief among them is the possibility of constitutional recognition of liberalism's insight and proffer: That domination, both public and private, is the enemy of personal autonomy, and must be checked—including by the State—to ensure that personal autonomy and the freedom it presupposes reigns. If only that success—progressive constitutionalism's rule as the rule of the rule of law, keyed to the waning of constitutionalism's current age—did not seem so far off. Like so much else, it is.

Where to turn in the interim? Assuming there is something to the old saw that the meaning of the Constitution is itself the result of a durable social consensus, one place to start trying to build one that aims in a progressive direction, toward, more precisely, the inauguration of a progressive Constitution, is found within bioethics, or more exactly, its dominant strand: liberal bioethics.

Many of the pieces are already in place. Indeed, they define it. Liberal bioethics is marked, perhaps above all, by a deep (some might say obsessive)⁶⁹ focus on respect for autonomy as a, if not *the*, key moral and political value. It operates with an understanding that personal autonomy is threatened by public domination. It recognizes the ways in which personal autonomy can be threatened by strictly private interpersonal domination as well. Moreover, it has an active sense that to violate personal autonomy is to commit an injustice.

It is true that liberal bioethics has never had a robust understanding of the phenomenon of private structural domination. Nor has it had any serious account of it as a part of any ethical analysis. But its liberalism, properly understood, not to mention the private structural dominations—the racisms—that defined the social backdrops of the field's "founding scenes,"⁷⁰ suggests it should be possible for its interlocutors to see and fill in its gaps.

68. See, e.g., West, *supra* note 38, at 1163–72.

69. See, e.g., Carl E. Schneider, *After Autonomy*, 41 WAKE FOREST L. REV. 411 (2006).

70. These are the Nazi concentration camp "experiments," and domestically, the Tuskegee syphilis "experiments."

Happily, that work need not begin from scratch. For years now, there has been a strong, dissident strain in bioethics that has pursued just the sort of robustly liberal project I am describing.⁷¹ Largely ventured “outside” liberal bioethics, and kept there by its guardians, it is still there within the bioethics discourse, with deep affinities to liberal bioethics (and, of course, of liberal bioethics to it). Following its lead, liberal bioethics could reconstitute itself and set itself and its working theories in progressive-liberal directions.

To do this would require some sacrifice. Liberal bioethics would have to suspend its deeply constitutionalistic understanding of ethics, including its understanding of individual rights. It would have to jettison the view that rights are basically trumps on State action—a view that, as it has generally been specified, does not give adequate or equal regard to the liberal right to be free from private domination in the choices we make for ourselves.

But it is easy enough to imagine liberal bioethics—at least for a spell—“taking a break”⁷² from its legal and, in particular, its constitutional, governance aspirations so as to begin to expand its own understanding of what it itself—on its own, hardly an anemic regulatory discourse—compels.⁷³

Asking liberal bioethics to abandon its desire to rule us—or to rule us at the constitutional level—is not a small request. Still, it does seem easier to imagine unhooking liberal bioethics from constitutionalism than it is to imagine unhooking constitutionalism from itself.

Who knows what might happen if liberal bioethics gave its constitutional governance aspirations a rest for a spell? It is not inconceivable that liberal bioethics could start turning out an entirely new practice of ethics that, some time down the road, might be capable of being exported, translated, and embraced by, among others, lawmakers seeking to interpret the legislated Constitution. (One can hope.)

To be sure, reconfiguring liberal bioethics and bioethics, more generally, by turns, is not the same thing as taking constitutionalism on head-on as part of a larger, systematic effort to ensure individuals enjoy the freedom from domination they need in order to make autonomous decisions for themselves when they can. But then, it is precisely because it is not—because its aspirations are comparatively more modest—that, in the short term especially, it seems possible to imagine that they could achieve a solid measure of success.

71. The genealogy of this “dissident” strain of liberal bioethics has not been written. Contemporaneously, it includes certain feminist and critical race theory work on biomedicine and its ethics. Dorothy Roberts’s scholarship, particularly on race, sex, and class in the context of reproduction, for example, Dorothy E. Roberts, *Privitization and Punishment in the New Age of Reprogenetics*, 54 EMORY L.J. 1343 (2005), is exemplary. See also *id.* at 1343 n.2 (collecting sources).

72. Cf. JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006). This is not to endorse the “break” Halley urges.

73. I thus join Carl Schneider in the conclusion that courts should not make “biomedical policy . . . through constitutional *adjudication*,” though for reasons different than his. Carl E. Schneider, *Making Biomedical Policy through Constitutional Adjudication: The Example of Physician-Assisted Suicide*, in *LAW AT THE END OF LIFE: THE SUPREME COURT AND ASSISTED SUICIDE* 164, 164 (Carl E. Schneider ed., 2000) (emphasis added).

What this would mean for the right to die is, as before, potentially hugely significant: a certain freedom at the borderland between life and death, and a certain promise that, as we approach this threshold, we will not be denied mastery over ourselves yet again. Trying to get things right that way, in the context of the right to die, would not and should not be the end game for liberal bioethics—or anything else. But it is as good as any other place to start.

