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PHYSICIAN-ASSISTED SUICIDE AND FEDERALISM

BRIAN H. BIX*

INTRODUCTION

Law is often concerned with deciding who decides. The legal process school of the last generation was built around inquiries into institutional competence and the legal profession's (purported) expertise at finding the right procedures for each type of decision.[1] Within the American political system, the question of who decides is also often quite prominent: at what level the decision should be made (individual, municipal, state, or federal), and by what sort of institution (individual, family, administrative agency, court, or legislature).

This focus on the *process* of decision, to the point where process almost seems to be more important than outcome, is also present, though in a different form, in the area of medical decision-making. With controversial medical treatment decisions—for example, "right to die" decisions, medical treatment decisions for severely handicapped infants, and decisions for the legally incompetent—a focus on adding required procedures and decision-makers may be a way of dealing with our own conflicting views about whom to trust and whom not to trust (sometimes we prefer distance and objectivity, sometime closeness and connection).[2]

The question of who decides is the focus of discussions of federalism. The United States is a federal republic, with powers and responsibilities divided between the federal government and the states. This federalist system has consequences for the way issues are considered in this country, and physician-assisted suicide is no exception. This article will situate the problem of phy-

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1. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). For a more recent analysis, see, for example, NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (2000).

2. The best discussion of these issues is still Martha Minow, *Beyond State Intervention in the Family: For Baby Jane Doe*, 18 U. MICH. J.L. REFORM 933 (1985), which looks at those issues in the context of medical decisions for severely handicapped infants.

sician-assisted suicide within the legal and social-science literature on federalism. Part I considers the interaction of decision-makers within the American federal system: how the decisions of individual states can have extra-territorial effects, and how such effects have been treated within American constitutional law and in recent federal policy debates, including the debates over physician-assisted suicide. Part II takes a step back to look at some general theories from political science and economics regarding federalism, and considers the implications of those theories for physician-assisted suicide.

I. Interactions Between States and Between State Governments and the Federal Government

The basic notion of American federalism is that decisions are divided between the central, national government and the individual states.[3] Additionally, within the states, power is frequently devolved further to municipalities and other entities; however, for present purposes, the article will focus almost exclusively on the choice between federal and state regulation. In the practice of American federalism, various themes have emerged: in particular, the idea of states as experimental laboratories; and the tension between state autonomy, national citizenship, and federal governmental initiatives.

A. *States as Laboratories*

Justice Louis Brandeis famously described the value of federalism in terms of how the states can try out new programs and approaches—the states as "laboratories":

> To say experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a

3. While those within the American political tradition usually speak of "federalism," the notion of "subsidiarity" within the European tradition is similar. For example, the Treaty Establishing the European Community states: "In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community." Consolidated Version of the Treaty Establishing the European Community, Article 5 (ex Article 3b), *available at* http://europa.eu.int/eurlex/en/treaties/dat/ec_cons_treatyen.pdf (1997) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

laboratory; and try novel social and economic experiments without risk to the rest of the country.[4]

Thus, states are generally to be encouraged to try out new approaches to dealing with social, and even moral, problems. At the same time, one need not assume that experimentation is always valuable for its own sake, any more than one should assume that liberty is valuable, however it might be used.[5] We might rightly resist allowing certain states to "experiment" with slavery, torture, or involuntary euthanasia.[6] One justification for federal intervention would be the belief that certain matters should be beyond the scope of state choice.

The notion of using the state as experimental laboratories is also connected with the desire of the federal courts (and, to some extent, Congress) not to intervene on issues until the consequences of various approaches have become clearer through actual practice. The United State Supreme Court decisions that refused to recognize a constitutional right to physician-assisted suicide, *Washington v. Glucksberg*[7] and *Vacco v. Quill*,[8] contained numerous references to the on-going state "experimentations" on the issue,[9] indicating, perhaps, that one problem with the challenges in those cases was that they were brought too early.

Oregon is currently the only "laboratory" in the United States experimenting with physician-assisted suicide. In the 2000 Election, Maine narrowly defeated a ballot measure which would have allowed physician-assisted suicide.[10] Similar initiatives had also been defeated in Washington in 1991 and in California in

4. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

5. *See* Erwin Chemerinsky, *Federalism Not as Limits, But as Empowerment*, 45 KAN. L. REV. 1219, 1235–36 (1997). On questioning whether liberty is always valuable, regardless of its use, see James Fitzjames Stephen, *Liberty, Equality, Fraternity*, *in* LIBERTY, EQUALITY, FRATERNITY AND THREE BRIEF ESSAYS 135–78 (Univ. Chicago Press 1991) (1873) ("The Doctrine of Liberty in its Application to Morals"); JOSEPH RAZ, THE MORALITY OF FREEDOM 1–19 (1986).

6. Of course, there are some who consider physician-assisted suicide to be equally a clear evil, on which experimentation should not be allowed.

7. 521 U.S. 702 (1997).

8. 521 U.S. 793 (1997).

9. *See, e.g.*, *Glucksberg*, 521 U.S. at 719, 735; *id.* at 737 (O'Connor, J., concurring); *id.* at 738 (Stevens, J., concurring in the judgment); *id.* at 786–89 (Souter, J., concurring in the judgment).

10. The Maine Death with Dignity Act, which seems to have been based largely on the Oregon law, was defeated on November 7, 2000, by a vote of 332,280 to 315,031, thus a difference of only about 2.7% of all the votes cast. *See Referendum Election Tabulations: November 7, 2000*, *reproduced at* http://www.state.me.us/sos/cec/elec/2000g/gen00r-s.htm (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

1993.[11] Finally, the Hawaii legislature defeated a comparable proposal in 2002.[12] Of course, experimentation on this issue is also going on in other countries,[13] and there is no reason why Americans should not try to learn from foreign experiences.[14]

B. *Extra-Territorial Effects (the Examples of Marriage, Divorce, and Welfare)*

The flip-side of seeing each state as a laboratory for experimentation within our multi-state federal system, is to note how often the combination of normal practices and constitutional doctrines can cause a single state's decisions to have nation-wide effects.

The most famous recent example of this phenomenon came when first Hawaii and later Vermont threatened to recognize same-sex marriages. In both cases, same-sex couples had challenged, on the basis of state constitutional protections, decisions not to allow them to marry.[15] The Hawaii "threat" was eventually foreclosed by a referendum that modified the state constitution to authorize legislation confining marriage to opposite-sex couples.[16] The Vermont litigation resulted in a court order that the state legislature *either* extend marriage to same-sex couples *or* create an alternative institution that would give same-sex couples *all* the (state-law) benefits of marriage. The Vermont Legislature chose the second option, creating "civil unions" for same-sex couples.[17]

Before either state had resolved the legal challenges, the federal government became involved in the debate. The federal intervention was based on concerns arising from the Full Faith and Credit Clause of the United States Constitution:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings by every other State. And the Congress may by general Laws pre-

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11. *See Glucksberg*, 521 U.S. at 716–17.

12. Michele Kayal, *National Briefing: Hawaii—Defeat on Assisted Suicide*, N.Y. TIMES, May 4, 2002, at A10.

13. *See Euthanasia Bill is Okd in Parliament*, L.A. TIMES, May 17, 2002, at A4 (Belgium right-to-die bill); David Lister, *Euthanasia Made Legal in Holland*, TIMES (London), Apr. 11, 2001, at 1; Marlise Simons, *Dutch Becoming First Nation to Legalize Suicide*, N.Y. TIMES, Nov. 29, 2000, at A3.

14. *Cf. Glucksberg*, 521 U.S. at 734 (discussing a 1990 Dutch government study that summarized that country's experience).

15. *See* Baker v. Vermont, 744 A.2d 864 (Vt. 1999); Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

16. Baehr v. Miike, 994 P.2d 566 (Haw. 1999) (On the basis of the referendum, the original court challenge was dismissed as moot.).

17. 2000 Vt. Acts & Resolves 91, § 1.

> scribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.[18]

The Full Faith and Credit Clause has been held to require one state to enforce the valid divorce judgments of another state.[19] This seemed to allow one state with, say, relatively easy standards for gaining access to divorce to undermine the policies of states that had more restrictive standards. The only thing that prevented the easy-divorce states from *entirely* undermining the policies of the difficult-divorce states was the rule that states have the power to grant divorces only if the petitioning spouse was a domicile of the state in question. Such a standard is one that those merely visiting for the weekend (or even for the summer) could not meet.[20]

The Full Faith and Credit Clause clearly applies to divorce decrees, because they are judgments of the court ("judicial Proceedings" under the clause). It is far less clear that marriages are covered by the clause. Marriages are not "judicial Proceedings," nor are they in any obvious way the "public Acts [or] Records" of the state. If a marriage celebrated in one state is binding in another state under the Full Faith and Credit Clause, it *is* because of the "full faith and credit" each state must grant the *laws* under which the marriage was celebrated.[21] Nonetheless, many people worried that if same-sex marriages were to be valid in one state, other states might be legally bound to recognize those marriages, even if those other states had a strong public policy against recognition of such marriages.[22] This may have

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18. U.S. CONST. art. IV, § 1.

19. Williams v. North Carolina, 317 U.S. 287 (1942).

20. *See* Williams v. North Carolina, 325 U.S. 226 (1945) (holding that another jurisdiction had the right to question the jurisdictional basis of a migratory divorce before granting the divorce-granting state's decree full faith and credit); *see also* Fink v. Fink, 346 N.E.2d 415 (Ill. App. Ct. 1976) (refusing to give full faith and credit to a Nevada divorce; holding that the husband had not obtained domiciliary status in Nevada despite his significant efforts to do so).

21. *See* Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1976, 1999 (1997).

There would similarly seem to be "full faith and credit" limits on other states' abilities to penalize an estate because the deceased had taken advantage of the Oregon physician-assisted suicide legislation, because it is one of "the public Acts" to which full faith and credit must be given.

22. The Full Faith and Credit Clause creates federal constitutional law that binds the states regarding their freedom to recognize or not recognize the laws and judgments of other states. *See* Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998) (declaring that there is no "roving 'public policy exception' to the full faith and credit due judgments").

However, at a different level from the constitutional strictures of the Full Faith and Credit Clause, there are the traditional principles of conflict of laws, under

been a baseless fear,[23] but it was the basic justification for the passage of the Defense of Marriage Act (DOMA).[24] DOMA authorized states not to recognize same-sex marriages if they so desired,[25] thus reducing the fear that recognition of same-sex marriage by one state would impinge on the marriage policies of other states.

Thus, DOMA tries to answer one problem of American federalism: how can one require states to respect the laws and judgments of other states without simultaneously giving each state the power potentially to undermine the policies of every other state? DOMA does this by giving each state the limited power *not to recognize* certain sorts of marriages entered into in other states.

However, the basic tension of American federalism inevitably remains: the problem of simultaneously granting significant autonomy to the individual states while maintaining a national identity and rights of national citizenship. For example, while Utah might be authorized by DOMA to prevent Vermont decisions on same-sex marriage from "infecting" Utah's policies regarding whom to give the benefits of marriage, Vermont has no reciprocal power to prevent Utah residents from moving to

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which a marriage which is valid where celebrated will be recognized in other jurisdictions. However, conflict of laws principles (unlike Full Faith and Credit, *see supra Baker*) recognizes an exception when the marriage "violates the strong public policy of another state . . . ." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971).

23. Arguably baseless because other states would probably not be bound to recognize a marriage by the Full Faith and Credit Clause, and standard conflict of laws principles would likely allow states to deny enforcement under a "public policy" exception. *See supra* text accompanying note 22.

24. Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C.A. § 7 (1997 & Supp. 2002), 28 U.S.C.A. § 1738C (Supp. 2002)).

25. DOMA states:

> No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . , or a right or claim arising from such relationship.

28 U.S.C.A. § 1738C (2002).

The constitutional status of DOMA is highly contested. Some argue that Congress was merely acting under the express authorization of the Full Faith and Credit Act: "And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1. Others argue that this power granted to Congress operates only on the margins, and does *not* give Congress the power to authorize states not to recognize the laws of other states. *See, e.g.*, 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-35, at 1247 n.49 (3d ed. 2000).

Vermont to take advantage of Vermont's civil unions law.[26] It is part of constitutional federalism that states have no power to deny access of laws or benefits to someone simply because they are new to the state. This point was reaffirmed in the 1999 Supreme Court decision of *Saenz v. Roe*,[27] where the Court invalidated a California statute that limited the welfare benefits available to newly arrived residents.[28] This was held to violate the constitutional right to interstate travel.[29]

At the same time, the United States Supreme Court *has* allowed states to impose residence-durational requirements, at least on some benefits offered by the states. In *Sosna v. Iowa*,[30] the Court upheld Iowa's one-year residency requirement for obtaining a divorce in the Iowa courts. In upholding the residency requirement, the Court stated that it

> furthers the State's parallel interests both in avoiding officious intermeddling in matters in which another State has a paramount interest, and in minimizing the susceptibility of its own divorce decrees to collateral attack. A State such as Iowa may quite reasonably decide that it does not wish to become a divorce mill for unhappy spouses . . . .[31]

Thus, the Supreme Court has expressly affirmed as legitimate a state's interest in not becoming a magnet to out-of-state citizens, based on the services or benefits it offers.[32]

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26. With new institutional options like civil unions, the pressure is likely to be in the opposite direction: for Vermont to use the availability of "civil unions" as an enticement for tourism and immigration from other states. *See, e.g.*, Jennifer G. Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745 (1995); Carey Goldberg, *Gays and Lesbians Head for Vermont to Make It Legal, But How Legal Is It?*, N.Y. TIMES, July 23, 2000, at 12 (reporting that "[s]ome town clerks [in Vermont] report that two-thirds or more of the certificates they issue are to out-of-staters.").
As will be discussed shortly, the states do not have the power to *foreclose* offering a benefit to a new resident, but they *do* have the right, in most instances, to *delay* making the benefit available.

27. 526 U.S. 489 (1999).

28. California has one of the most generous welfare programs in the nation. It hoped to save money by limiting new residents during their first year in the state to the benefits they would have received in the states of their prior residence. *Id.* at 492.

29. A doctrine introduced in Shapiro v. Thompson, 394 U.S. 618 (1969); *see also* Zobel v. Williams, 457 U.S. 55 (1982).

30. 419 U.S. 393 (1975).

31. *Id.* at 407.

32. However, a comparable argument for welfare benefits has been twice rejected. *Saenz*, 526 U.S. at 506; Shapiro v. Thompson, 394 U.S. 618 (1969). Though the Court has made the effort to treat the decisions in *Shapiro, Sosna,* and *Saenz* as consistent, it is not easy to do. *Compare Saenz*, 526 U.S. at 505 (majority opinion), *and Sosna*, 419 U.S. at 405–10 (majority opinion), *with*

A state might thus create a residency, or duration-of-residency requirement, both to prevent unwanted travel by outsiders merely to take advantage of an in-state benefit,[33] and to lessen concerns and hostility of other states based on the way the state's laws and benefits might undermine the policies of other states (a theme approved by the Supreme Court in its discussion in *Sosna* of Iowa's duration-of-residency requirement for divorce). With physician-assisted suicide, the second concern seems likely more compelling than the first.

The Oregon statute imposes a residency requirement, thus minimizing its extraterritorial effects. No one qualifies to use legal physician-assisted suicide who is not a "resident of Oregon."[34] While no bright-line rule is given for determining whether someone is an Oregon resident,[35] the statute points to four factors: having an Oregon driver's license; having registered to vote in the state; leasing or owning property in the state; and having filed an Oregon tax return for the most recent tax year.[36] Therefore, merely traveling to Oregon for a long weekend, or an extended vacation, would be insufficient to qualify someone to seek physician-assisted suicide under the Oregon Act. One need not fear "death tourism."[37] However, as discussed above, there is no constraint on the ability of United States citizens to move from some other state to Oregon with the intention of taking advantage of the statute once settled there as full-time residents.

There might yet be state-state policy interference in the other direction: decisions by other states that have the purpose or effect of undermining Oregon's legalization of physician-assisted suicide (federal interference with Oregon's policy will be discussed in the next section). For example, consider the situation of physicians licensed in more than one state: what if Idaho sought to revoke a physician's license on the basis that this doc-

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Saenz, 526 U.S. at 511–21 (Rehnquist, C.J., dissenting), *and Sosna*, 419 U.S. at 418–27 (Marshall, J., dissenting).

33. Though there are limits on the state's power to do this, at least when welfare benefits are involved, as the *Saenz* and *Shapiro* decisions indicate.

34. OR. REV. STAT. 127.805 § 2.01 (2001); *see also id.*, 127.800 § 1.01 (11) (defining "qualified patient" for the purpose of the Act as "a capable adult who is a resident of Oregon and has satisfied the requirements of [the Act]"); *id.*, 127.860 § 3.10 ("Only requests made by Oregon residents . . . shall be granted.").

35. *See id.*, 127.860 § 3.10 ("Factors demonstrating Oregon residency include but are not limited to [the four factors listed].").

36. *Id.*

37. *Cf.* Fiona Fleck, *Swiss Group Said to Push 'Suicide Tourism'*, NAT'L POST, Aug. 26, 2002, at A14; David Lister, *'Death Tourism' Fear as Dutch Back Euthanasia*, TIMES (London), Apr. 11, 2001, at 17.

tor had participated in an assisted suicide? It is quite possible that the Full Faith and Credit Clause would preclude that sort of interference (on the basis that it would be a failure on Idaho's part to give full faith and credit to the "public Acts" of Oregon), but that legal question is far from fully settled.

C. *Federal Intervention*

The federal government has already stepped in, to a limited extent, to constrain state experimentation in the area of physician-assisted suicide, and some federal officials have tried to end the experiment entirely.

The first form of federal intervention with the Oregon legislation in fact came neither from the legislative branch nor from the executive branch, but from the judicial branch. The legislation legalizing physician-assisted suicide, after being passed in a November 1994 referendum, was supposed to go into effect in December 1994. However, a federal district court enjoined implementation of the Act, on the basis of a lawsuit which claimed that the legislation violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[38] However, the district court decision was overturned by the Ninth Circuit Court of Appeals, and the United States Supreme Court refused to hear the appeal.[39]

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38. The preliminary injunction, and its justification, appears in Lee v. Oregon, 869 F. Supp. 1491 (D. Or. 1994). The permanent injunction appears in Lee v. State, 891 F. Supp. 1429 (D. Or. 1995), *rev'd sub nom.* Lee v. Oregon, 107 F.3d 1382 (9th Cir. 1997), *cert. denied,* 522 U.S. 927 (1997).
The initial suit was brought by "two physicians, four terminally ill or potentially terminally ill patients, a residential care facility, and individual operators of residential care facilities." *Lee,* 869 F. Supp. at 1493. The plaintiffs claimed that the Act violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment, as well as the First Amendment rights to free exercise of religion and association, and the Americans with Disabilities Act. *Id.* The eventual injunction was based only on the Equal Protection claim. *Id.* at 1437. The court stated:

> [The Oregon Act] provides a means to commit suicide to a severely overinclusive class who may be competent, incompetent, unduly influenced, or abused by others. The state interest and the disparate treatment are not rationally related and [the Act], therefore, violates the Constitution of the United States.

Id. (footnote omitted).

39. Lee v. Oregon, 107 F.3d 1382 (9th Cir. 1997), *cert denied,* 522 U.S. 927 (1997).
The Circuit Court decision was grounded on the fact that none of the plaintiffs had the requisite standing to challenge the statute and their claims lacked "ripeness"—that is, that the plaintiffs could not claim actual harm from the Act, or any imminent harm that was more than highly speculative. *Id.* at 1387–92.

The injunction against implementation of the Oregon legislation had been lifted on October 27, 1997, and in November of the same year, Oregon voters rejected by a margin of 60% to 40% a referendum effort to repeal the legislation.[40] (Sixteen patients died ingesting legally prescribed lethal medication in 1998; twenty-seven in 1999; twenty-seven in 2000; and twenty-one in 2001.)[41]

The Federal Assisted Suicide Funding Restriction Act of 1997 was a more "successful" federal intervention, prohibiting the use of federal funds in support of physician-assisted suicide.[42] More extensive and constraining federal intervention has been introduced, but has not (yet) been enacted. The Pain Relief Promotion Act was introduced in the House and the Senate in both 1999 and 2000, and was in fact passed by the House in October 1999 before it died in the Senate.[43] That Act would, among other things, have made it illegal to use a federally controlled substance in physician-assisted suicide (and most commentators viewed blocking physician-assisted suicide in Oregon as this Act's main purpose).[44]

On November 6, 2001, Attorney General John Ashcroft sent a letter to the Drug Enforcement Administration, a copy of which was published in the Federal Register, stating that assisting suicide was not a "legitimate medical purpose," and therefore the use of controlled substances to effect that purpose would violate the Controlled Substances Act,[45] and make a physician's license subject to suspension or revocation if she prescribed controlled

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40. *See* OR. DEP'T OF HUMAN SERVS., FOURTH ANNUAL REPORT ON OREGON'S DEATH WITH DIGNITY ACT 6 (2002), *available at* http://www.ohd.hr.state.or.us/chs/pas/01pasrpt.pdf (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

41. *See id.* at 3.

42. 42 U.S.C.A. § 14401 (Supp. 2002). The statute extends the prohibition of federal funding also to euthanasia and mercy killing. *Id.*

43. H.R. 2260 passed the House of Representatives on October 27, 1999, by a vote of 271-156. In the Senate, it was reported favorably out of the Judiciary Committee on May 23, 2000, but received no further attention before the 106th Congress ended (legislative history available at http://thomas.loc.gov/); *see also* Jim Barnett, *Legislative Action on the Suicide Law is Not Expected Soon,* OREGONIAN, Apr. 18, 2002, at A1. No new federal legislation is expected in the 107th Congress.

44. In 1998, President Clinton's Attorney General, Janet Reno, had ruled that the federal controlled substances legislation did not preclude the medical use of such substances, including physician-assisted suicide. Jim Barnett, *Bush May Act on Assisted Suicide,* OREGONIAN, Feb. 2, 2001, at A7.

45. 21 U.S.C.A. §§ 801-950 (1999 & Supp. 2002).

substances for that purpose of assisting suicide.[46] The State of Oregon subsequently filed a complaint in the United States District Court for the District of Oregon, seeking declaratory and injunctive relief from the Attorney General's Directive.[47] Judge Robert E. Jones initially granted temporary relief, and eventually granted a permanent injunction against enforcement of the Directive.[48] The District Court grounded the injunction on the conclusion that the Attorney General's actions had exceeded his authority under the Controlled Substances Act.[49]

There is ample evidence that Oregon residents, whatever their positions on the issue of physician-assisted suicide, generally have not reacted well to the perceived federal interference with what is perceived to be a state matter.[50]

II. THEORIES OF FEDERALISM

Within the political science and economics literature, there are a variety of perspectives on the values and effects of federalism. Those who theorize about the subject often seek ideas about how the various levels of government *should* divide their responsibilities. Two commentators summarized the prevailing views as follows:

> [T]hose who value a federal system typically do so for some mix of three reasons: it encourages an *efficient* allocation of national resources; it fosters *political participation* and a sense of the democratic community; and it helps to protect basic *liberties and freedoms*.[51]

Beyond these theories *supportive* of federalism and offering *prescriptions* for its use, there are also theories, not always as supportive, about federalism's likely effects. The subsections that follow will consider both supportive and more cynical/descriptive views

46. *See* Dispensing of Controlled Substances to Assist Suicide, 66 Fed. Reg. 56,607 (Nov. 9, 2001) (to be codified at 21 C.F.R. pt. 1306); State v. Ashcroft, 192 F. Supp. 2d 1077, 1078–79, 1082–84 (D. Or. 2002).

47. A physician, a pharmacist, and a number of terminally ill patients were allowed to intervene. State v. Ashcroft, 192 F. Supp. 2d at 1084.

48. *Id.* at 1084–85.

49. *Id.* at 1087–93. An appeal to the Ninth Circuit Court of Appeals is expected. Ashbel S. Green, *Suicide Law May Go to the 9th Circuit*, OREGONIAN, Apr. 21, 2002, at A1.

50. *See* David Sarasohn, *Ashcroft Ruling Stirs the Embers in Oregon*, OREGONIAN, Nov. 11, 2001, at B1; Sam Howe Verhovek, *Oregon Chafes at Measure to Stop Assisted Suicides*, N.Y. TIMES, Oct. 29, 1999, at A1.

51. Robert P. Inman & Daniel L. Rubinfeld, *Rethinking Federalism*, 11 J. ECON. PERSP. 43, 44 (1997).

of federalism, and will consider their possible application to the issue of physician-assisted suicide.

A. *Competitive Federalism*

One group of theories about federalism is "competitive federalism," the view that states tend to compete with one another for various objectives and benefits.[52] One common version of this theory asserts that federalism often leads to a "race to the bottom." For example, if different governments are competing to have businesses relocate to their area, these governments might end up topping one another not only for the generosity of the tax benefits and subsidies offered, but also for the laxness of their pollution, employee safety, and employee-rights regulations. The notion of calling such competition a "race to the bottom" is that the competition might lead to results (as in the example of the ever-decreasing protections for workers and the environment) which were contrary to the common good.

There are other circumstances, where there might be, instead, a "race to the top,"[53] where the competition was seen as creating socially beneficial results, or at least morally neutral benefits for some class(es) of persons. Some have argued, for example, that there is competition among the states to create the most "efficient" rules for the regulation of commercial activities.[54]

While there is little evidence that Oregon's legalization of physician-assisted suicide should be seen as part of some competition with other states to attract residents, health care provision generally could easily be part of such a contest.[55]

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52. *See, e.g.*, THOMAS R. DYE, AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS (1990).

53. *See, e.g.*, F. H. Buckley & Margaret F. Brinig, *Welfare Magnets: The Race for the Top*, 5 S. CT. ECON. REV. 141 (1997).

54. *See, e.g.*, Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2361 (1998) ("There is a substantial literature . . . indicating that shareholders have benefitted from the federal system of corporate law by its production of corporate codes that, for the most part, maximize share value.").

55. As it happens, Oregon has the reputation for quite good hospice care and innovative, if sometimes controversial, ideas about the rationing of health care and health care insurance. (If one had either an active imagination or a highly cynical disposition, one might also speculate that a state's provision of end-of-life services and laws could serve as a means for the state to obtain funds from estate taxes; however, for the moment at least, this seems far-fetched as a characterization of the motivation of those supporting reform proposals.)

B. *Sorting and Responsiveness*

An alternative theory is one of sorting—a theory that could be seen as connected to the idea of the states as laboratories for experimentation, discussed earlier. Under this view of American federalism, the heterogeneity of ways of life and views of the good are more conveniently dealt with by allowing different states and local governments to reflect different values. While Vermont or New York, say, might recognize same-sex unions and offer benefits to non-married cohabitants, perhaps Utah or Louisiana might deny benefits to same-sex and non-married couples, and try instead to create a more binding form of marriage. Similarly, the "libertarian-inclined" State of Oregon might have a distinctively different approach to physician-assisted suicide and the right to die than might a state influenced by a large population of devout Catholics among its citizens.[56]

Even if one does not think in terms of large value differences from region to region (or from state to state), there will inevitably be noticeable demographic differences. Federalism, in particular decentralization of decision-making, is often justified by such differences. "The hope is that state and local governments, being closer to the people, will be more responsive to the particular preferences of their constituencies and will be able to find new and better ways to provide these services."[57]

C. *Federalism and Efficiency*

Some economists have argued for an application of federalist principles such that the central government is involved only with those issues which involve significant externalities across geographically wide areas (*e.g.*, environmental issues).[58] Beyond the question of externalities, economic federalism would simply inquire (perhaps unsurprisingly) as to which level of government could provide the services in question most *efficiently*. The presumptive efficiency of (more) local government under this

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56. One obvious example of a state reacting to physician-assisted suicide in a way opposite to Oregon was Michigan, which responded to Dr. Jack Kevorkian's highly publicized physician-assisted suicides by repeated prosecutions and by express criminalization of the act. *See, e.g.*, Valerie J. Vollmar, *Recent Developments in Physician-Assisted Suicide—June 2002, at* http://www.willamette.edu/wucl/pas/pasupdatejune2002.html (last visited Aug. 27, 2002) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

57. Wallace E. Oates, *An Essay on Fiscal Federalism*, 37 J. ECON. LITERATURE 1120, 1120 (1999).

58. *See, e.g.*, WALLACE E. OATES, FISCAL FEDERALISM (1972).

model is tied to an analysis similar to the discussion of sorting and responsiveness discussed in the prior section.[59]

For physician-assisted suicide—to whatever extent one might think it proper to think of this as a "provision of a service"—more local decision-making would seem appropriate, unless and until the local rules had significant spillover effects. As already discussed, as long as the state laws on physician-assisted suicide have a residency requirement, or something comparable, there are unlikely to be substantial spillover effects.

D. *State's Rights and Sovereign Immunity*

There are also *legal* theories of federalism, ideas about what the United States Constitution *requires* by way of the division of powers between the federal government and the states. The United States Supreme Court has recently decided a series of cases which have provided substantial protection for state sovereignty and state prerogatives, as against federal power. Many of these cases are based directly or indirectly on the Eleventh Amendment,[60] which by its text seems merely to put a small constraint on the diversity jurisdiction of the federal courts, but which has been held to be a broader recognition of state sovereign immunity.[61] Parallel with the broad reading of the Eleventh Amendment has been an ever-narrower reading of Congress' powers to bind the states under either the Commerce Clause[62] or Section Five of the Fourteenth Amendment.[63] Some of the latter cases have indicated that certain subjects are presumptively

59. *See* Truman Bewley, *A Critique of Tiebout's Theory of Local Public Expenditures*, 49 ECONOMETRICA 713 (1981); Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

60. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

61. *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996); Hans v. Louisiana, 134 U.S. 1 (1890); *see also* Pennsylvania v. Union Gas Co., 491 U.S. 1, 39 (1989) (Scalia, J., concurring in part and dissenting in part) (describing the Eleventh Amendment as reflecting a "broad constitutional principle of sovereign immunity").

62. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995).

63. *See, e.g.*, Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (analyzing the case primarily under Section Five); United States v. Morrison, 529 U.S. 598 (2000) (discussing both the Commerce Clause and Section Five of the Fourteenth Amendment). *Garrett* seems to limit the scope of federal regulation authorized by Section Five to protection of oppressed groups who already have constitutional protection under the Fourteenth Amendment.

beyond Congress' power to regulate: non-economic regulation, especially if it concerns the family.[64]

There may well be no connection between this line of cases and the issue of physician-assisted suicide, but it is just possible, depending on the nature and wording of the federal regulation in question, that this Supreme Court *might* invalidate a federal law which interfered with the state regulation of medical practices—though it is more likely that such federal regulation would be upheld. Regulations which do not impose liability on the states themselves, and do not "commandeer" state governments to do the bidding of the federal government,[65] are usually upheld.

E. *Application to Physician-Assisted Suicide*

Both the Oregon law and most other recent proposals[66] impose a residency requirement on those who would take advantage of the legalization of physician-assisted suicide. That alone should be sufficient to mollify most concerns about one state's laws undermining the policies of other states, or about there being a ghoulish "race to the bottom" for the medical-suicide "tourist trade." Here, it is interesting to contrast the likely effects of two different controversial state health legalizations—physician-assisted suicide and medical marijuana[67]—and perhaps add in the non-medical example of same-sex marriage. Though some commentators had suggested that there might be a strong financial incentive for states to enact same-sex marriage in order to gain the tourism dollars from those who would take advantage

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64. *See Morrison*, 529 U.S. at 599 (regulation of domestic relations); *Lopez*, 514 U.S. at 549 (criminal law matter without obvious interstate elements or effects).

65. *See, e.g.*, New York v. United States, 505 U.S. 144 (1992) (invalidating the Low-Level Radioactive Waste Policy Amendments Act of 1985, on the basis that it would either require states to implement federal regulations or to accept ownership of radioactive waste).

66. *See, e.g.*, *supra* note 10 and accompanying text.

67. As of February 2001, nine states had laws that protected medicinal marijuana users from state prosecutions. Tom Mashberg, *Debate Swirls Over Marijuana as Medicine*, B. HERALD, Feb. 25, 2001, at A1. However, in May 2001 the Supreme Court decided that there was no "medical necessity" exception to the federal statutory prohibition on the manufacture and distribution of marijuana. United States v. Oakland Cannabis Buyers' Coop., 523 U.S. 483 (2001). Given federal law supremacy, the states are powerless to legalize marijuana fully; full legalization will require a change in the federal law (just as a federal law banning physician-assisted suicide would trump state actions attempting to make assisted suicide legal).

of such laws,[68] there has in fact been no rush to that "top" or "bottom," because the proposal is sufficiently controversial that there will inevitably be serious resistance to the proposal, whatever the financial (or other) incentives might be for passage. Similarly, for physician-assisted suicide and medical marijuana: whatever incentives there might be for passage, the proposals inevitably evoke sufficiently strong ideological opposition that the marginal financial (or other) incentives are unlikely to cause quick passage—contrast rules like those regarding corporate governance or securities regulation, where those favoring business-friendly rules are likely to be well-organized and have a strong financial incentive in passage, while opponents are unlikely to be either strongly organized or strongly motivated.

Consider also one response to physician-assisted suicide: the federal legislation that prohibited the use of federal funds for physician-assisted suicide.[69] How that decision comports with federalist principles depends on one's views on at least two issues. First, does one consider physician-assisted suicide to be an acceptable option for individuals to use and states to authorize? Those who do not think so would not be inclined to think of physician-assisted suicide as a matter on which states should be allowed, or encouraged, to "experiment," and therefore, federal intervention to discourage or prohibit physician-assisted suicide would be appropriate.

Second, even assuming that physician-assisted suicide is an appropriate matter for state choice,[70] what is the baseline against which federal funding decisions are to be evaluated? If one considers the baseline to be "no funding," then a decision not to offer federal funds to physician-assisted suicides in Oregon seems entirely acceptable. This is an experiment *of that state*, and to require the citizens of other states, including states whose citizens sharply disagree with the practice, to subsidize Oregon's experiment, seems contrary to the whole notion of "the states as

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68. *See, e.g.*, Brown, *supra* note 26; Tammerlin Drummond, *The Marrying Kind*, TIME, May 14, 2001, at 52 (indicating that 80% of the civil union licenses issued to date have been to out-of-state residents, and that civil unions have contributed to Vermont's tourism industry).

69. *See supra* note 42 and accompanying text.

70. As discussed earlier, *supra* notes 5–6 and accompanying text, there is a sense in which state "autonomy" to experiment under federalism could be analogized to the autonomy given to individuals under some form of John Stuart Mill's "harm principle" (state criminalization is appropriate only where individual actions *harm* other people). While the analogy may be suggestive, it also has limitations: the constraints on state "autonomy" would likely be individual rights, moral principles, and the social good, not some general notion of "harm to other states."

laboratories." Each state, as experimenter, should make its own decisions and live with the costs and benefits of those decisions.

On the other hand, if the federal decision to block funds is seen against a baseline of general funding for medical procedures, then the federal decision is less a matter of a "failure to subsidize," fully justified under federalist principles, and more a matter of the federal government *trying to undermine* the practice. The inverse of the prior analysis then applies: just as experimenting states have no right to be subsidized by (the citizens of) other states, so they have a right not to be undermined by the federal government, representing the citizens of other states. There is no easy or obvious conclusion regarding the proper baseline for this analysis,[71] and the analysis raises conceptual, moral, and political questions far beyond the scope of this piece.

CONCLUSION

Under federalist principles, which prescribe the separation of political decision-making among different levels of government, it seems natural that some states might choose to legalize physician-assisted suicide, because it reflects the values of the citizens of those states. Additionally, it is beneficial that there be such "experiments" going on, as long as the spillover effects of the experiment can be minimized. At the moment, Oregon is the only such experiment in the United States, but it may be a sufficient "laboratory" for ascertaining the likely long-term effects of legalization.

71. A similar question is obviously raised by federal funding of abortions. *See, e.g.*, Harris v. McRae, 448 U.S. 297 (1980) (upholding from constitutional challenge the Hyde Amendment, which withheld Medicaid funding from almost all abortions); Michael J. Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on* Harris v. McRae, 32 STAN. L. REV. 1113 (1980).